UNITED STATES REPORTS

VOLUME 464

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1983

BEGINNING OF TERM
OCTOBER 3, 1983, THROUGH JANUARY 18, 1984
TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

HENRY C. LIND
REPORTER OF DECISIONS

UNITED STATES
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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, CHIEF JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.
WILLIAM H. REHNQUIST, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.

RETIRED

POTTER STEWART, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

WILLIAM FRENCH SMITH, ATTORNEY GENERAL.
REX E. LEE, SOLICITOR GENERAL.
ALEXANDER L. STEVAS, CLERK.
HENRY C. LIND, REPORTER OF DECISIONS.
ALFRED WONG, MARSHAL.
ROGER F. JACOBS, LIBRARIAN.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, Warren E. Burger, Chief Justice.

For the First Circuit, William J. Brennan, Jr., Associate Justice.

For the Second Circuit, Thurgood Marshall, Associate Justice.

For the Third Circuit, William J. Brennan, Jr., Associate Justice.

For the Fourth Circuit, Warren E. Burger, Chief Justice.

For the Fifth Circuit, Byron R. White, Associate Justice.

For the Sixth Circuit, Sandra Day O'Connor, Associate Justice.

For the Seventh Circuit, John Paul Stevens, Associate Justice.

For the Eighth Circuit, Harry A. Blackmun, Associate Justice.

For the Ninth Circuit, William H. Rehnquist, Associate Justice.

For the Tenth Circuit, Byron R. White, Associate Justice.

For the Eleventh Circuit, Lewis F. Powell, Jr., Associate Justice.

October 5, 1981.

Pursuant to the provisions of Title 28, United States Code, Section 42, *It is ordered* that the Chief Justice be, and he hereby is, assigned to the Federal Circuit as Circuit Justice, effective October 1, 1982.

October 12, 1982.

(For next previous allotment, see 423 U. S., p. vi.)

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 1976 edition.

Cases reported before page 801 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 801 *et seq.* are those in which orders were entered. Opinions reported on page 1301 *et seq.* are those written in chambers by individual Justices.

Page
Aaron *v.* New Mexico 858
Abadi *v.* United States 821
Abatti Farms, Inc. *v.* Agricultural Labor Relations Bd. 955
Abbott *v.* Adan 917
A. B. Dick Co.; Burroughs Corp. *v.* 1042
Abney, *In re* 981
Abramoff *v.* Wisconsin 994
Abrams; Dugar *v.* 898
Abreen Corp.; Laborers *v.* 1040
Adam Metal & Supply Co.; Shaheed *v.* 892
Adams *v.* Barnes 897
Adams *v.* Dayan 934
Adams *v.* Florida Parole and Probation Comm'n 940
Adams *v.* Shepherdsville 895
Adams *v.* South Carolina 1023
Adams *v.* Wainwright 1063
Adams Central School Dist. No. 090 *v.* Deist 893
Adamson *v.* Arizona 865
Adamson *v.* United States 833
Adan; Abbott *v.* 917
Adkins *v.* Hopper 834
A.D.M. Corp. *v.* Thomson 938
Administrative Judge, Phila. Domestic Relations Ct.; Winpenny *v.* 1001
Administrator, Ill. Atty. Reg. & Discip. Comm'n; Berry & Gore *v.* 1070
Affeldt *v.* J. C. Penney Co. 955
Agricultural Labor Relations Bd.; Abatti Farms, Inc. *v.* 955
Agricultural Marketing & Barg. Bd.; Mich. Canners *v.* 912,989,1006
Aguirre *v.* California 962
Ahmed *v.* American S.S. Owners Mut. Protection & Indem. Assn. 826
Aiken *v.* United States 1049

	Page
Aillon *v.* Connecticut	837
Aircraft Sales, Inc.; Atlantic Purchasers, Inc. *v.*	848
Air Transport Assn.; New York Dept. of Taxation & Finance *v.*	960
Air Transport Union; Williams *v.*	858
Akermanis; Sea-Land Service, Inc. *v.*	1039
Akron General Hospital; Filipas *v.*	999
Alabama; Banks *v.*	1010
Alabama; Bush *v.*	865
Alabama; Coulter *v.*	925
Alabama; Dobard *v.*	1063
Alabama; Duncan *v.*	1047
Alabama *v.* Eley	820
Alabama; Fillmore *v.*	938
Alabama; Fowler *v.*	918
Alabama *v.* Gordon	820
Alabama; Hall *v.*	859
Alabama; Ingram *v.*	1049
Alabama; Killough *v.*	1008
Alabama; Mallory *v.*	1047
Alabama *v.* McCrary	913
Alabama; Neal *v.*	1019
Alabama; Reese *v.*	838,1004
Alabama; Schultz *v.*	1070
Alabama *v.* Taylor	950
Alabama; Womack *v.*	986
Alabama Power Co. *v.* Nuclear Regulatory Comm'n	816
Aladdin's Castle, Inc.; Mesquite *v.*	927
Alaska; Alaska Land Title Assn. *v.*	1040
Alaska; Hiller *v.*	1008
Alaska; Ostrosky *v.*	1006
Alaska Land Title Assn. *v.* Alaska	1040
Alaska Lumber & Pulp Co. *v.* Reid Brothers Logging Co.	916
Alaska Northern Development, Inc. *v.* Alyeska Pipeline Service Co.	1041
Al Bryant, Inc. *v.* National Labor Relations Bd.	1039
Albuquerque Title Co.; Hurley *v.*	1044
Alcan Aluminum Ltd. *v.* Franchise Tax Bd. of Cal.	1041
Alcoholic Beverage Control Appeals Bd. *v.* Lewis-Westco Co.	863
Aldrich *v.* Kansas	819
Aldrich *v.* National Society for Children & Adults with Autism	1049
Alexander; Glover *v.*	990,1071
Alexander; Syria *v.*	874
Alexander *v.* Texas	928
Alexander *v.* Zeanah	861,978
Alford *v.* Allsbrook	1072

Page
Allard *v.* New Hampshire 933
Allen *v.* Commissioner 1018
Allen; Floyd *v.* 897
Allen *v.* United States 861
Allen *v.* Wright 888
Allied Supermarkets, Inc.; Borman's Inc. *v.* 908
Allsbrook; Alford *v.* 1072
Allsbrook; Coats *v.* 897
Aloha Airlines, Inc. *v.* Director of Taxation of Haw 7
Alonzo; Phillips *v.* 984
Alside, Inc. *v.* Weiner 866
Alston *v.* New York 855
Alvarez *v.* Texas 849
Alvero Cruz *v.* United States 960
Alyeska Pipeline Service Co.; Alaska Northern Development, Inc. *v.* 1041
Amadeo *v.* Kemp 956,1064
Amana Refrigeration, Inc.; Filco *v.* 956
Ambach; Bloch *v.* 914
Ambrose *v.* United States 986
Amerada Hess Corp. *v.* Green 1039
American Airlines, Inc.; Pfister *v.* 874,1004
American Broadcasting Cos., *In re* 1006
American Cast Iron Pipe Co. *v.* Pettway 809
American Family Life Assurance Co. *v.* Hiam 850
American International Coal Co. *v.* Commissioner 892
American Iron & Steel Inst. *v.* Natural Resources Defense Council 927
American Jewish Congress *v.* Department of Treasury 895
American Motorists Ins. Co. *v.* Zaitchick 851
American S.S. Owners Mut. Protection & Indem. Assn.; Ahmed *v.* 826
American Telephone & Telegraph; Forbes *v.* 1020
American Telephone & Telegraph Co. *v.* Litton Systems, Inc. 811,1073
American Telephone & Telegraph Co. *v.* MCI Communications Corp. 891
American Telephone & Telegraph Co.; MCI Communications Corp. *v.* 891
AMP Inc.; Galardo *v.* 915
AMP Inc.; Term Con Electronics *v.* 915
Anchor Motor Freight, Inc. *v.* Teamsters 819
Andersen & Co.; Schacht *v.* 1002
Anderson *v.* District Court, Jefferson County, Colo. 1051
Anderson *v.* Fisher 802
Anderson; Frey *v.* 1057
Anderson; Harvey *v.* 840
Anderson *v.* United States 838
Anderson *v.* Virginia 980,1046
Anderson County *v.* United States 1017

READEX FICHE best copy available

Page
Andrew *v.* United States 933
Andrews *v.* United States 817
Angel *v.* Midlam 802
Angus; Woodruff *v.* 830
Antone *v.* Strickland 1003,1064
Antonelli *v.* Field Enterprises, Inc. 1072
Apex Marine Corp.; Hick *v.* 830
Appleby *v.* Massachusetts 941
Apple Computer, Inc.; Franklin Computer Corp. *v.* 1033
Appling; Howell *v.* 1072
April *v.* Illinois 917
Aptos Seascape Corp. *v.* Santa Cruz County 805
Arambula *v.* United States 853
Arango *v.* New York 833
Aranguren; Flores *v.* 898,1005
Aranson; Colorado River Indian Tribes *v.* 982
Archer *v.* Metropolitan Transit Authority 802
Arellanes *v.* United States 834
Argento *v.* Lenard 815
Arias *v.* United States 962
Ariyoshi *v.* Pekarsky 1052
Arizona; Adamson *v.* 865
Arizona *v.* California 888
Arizona; Hartford *v.* 842,978
Arizona; Jeffers *v.* 865
Arizona; Knapp *v.* 988
Arizona; McMurtrey *v.* 858
Arizona; Mulligan *v.* 860,1005
Arizona *v.* Navajo Tribe 874
Arizona; Richmond *v.* 986
Arizona *v.* Routhier 1073
Arizona *v.* Rumsey 1038
Arizona *v.* San Carlos Apache Tribe 874
Arizona; Silva *v.* 999
Arizona *v.* Young 866
Arizona Bd. of Pardons and Parole; Malumphy *v.* 1072
Arizona Governing Comm. for Annuity & Comp. Plans *v.* Norris . 808
Arizona Interscholastic Assn.; Clark *v.* 818
Arizona Public Service Co. *v.* National Labor Relations Bd. 1043
Arkansas; Hayes *v.* 865
Arkansas; Henderson *v.* 1012
Arkansas; Henry *v.* 835
Arkansas; Johnson *v.* 851
Arkansas; Simmons *v.* 865

Page
Arkansas; Smith *v.* 890
Arkla, Inc. *v.* Hall 822
Armco Inc. *v.* Hardesty 1016
Armilio *v.* United States 891
Armstrong *v.* Armstrong 933
Armstrong *v.* Florida 865
Armstrong *v.* United States 1071
Arnold *v.* Eastern Air Lines, Inc. 1040
Arnold *v.* United States 1051
Arnold Industries, Inc. *v.* Stickler 909
Arnold Transit Co. *v.* Mackinac Island 804,1064
Arnott *v.* United States 948
Arruda *v.* Fair 999
Arthur Andersen & Co. *v.* Schacht 1002
Arthur Young & Co.; United States *v.* 888
Artic International, Inc. *v.* Midway Mfg. Co. 823
A/S Garonne-Glittre; Hasbro Industries, Inc. *v.* 1013
Ashby *v.* Texas 985
Ashe *v.* United States 824
Ashley *v.* Jackson 900,1003
Ashworth *v.* Los Angeles County 1011
Assad; Hospital Employees *v.* 806
Associated Builders & Contractors *v.* Carpenters Vacation Tr. Fund 825
Associates Financial Services Co. of Oregon, Inc.; Wright *v.* 834
Astilleros Espanoles, S.A. *v.* Standard Oil Co. (Indiana) 864
Atchison *v.* Career Service Council of Wyo. 982
Atencia *v.* Illinois 917
Atlanta; Brown *v.* 827
Atlantic Purchasers, Inc. *v.* Aircraft Sales, Inc. 848
Atlantic Richfield Co.; Eastern Air Lines, Inc. *v.* 915
Attorney General; Cohen *v.* 939
Attorney General; Committee for an Independent P–I *v.* 892
Attorney General; David *v.* 832
Attorney General of Fla.; Brummer *v.* 823
Attorney General of Fla.; Chavez *v.* 823
Attorney General of Ga.; Georgia Bd. of Naturopathic Examiners *v.* 894
Attorney General of Kan.; Kinnell *v.* 854
Attorney General of N. Y.; Daye *v.* 1048
Attorney General of Wash.; Camer *v.* 828
Attwell *v.* Heckler 941,1064
Attwell *v.* Metropolitan Atlanta Rapid Transit Authority 897,1005
Auclair *v.* Wyoming 909
Audia *v.* West Virginia 934
Auditor of Ohio; Lesiak *v.* 826,1064

Page

Auditor of Wash.; Mackey *v.* 894

Austin *v.* Decker Coal Co. 938

Austin *v.* United States 981

Autry *v.* Estelle 1,925,1301

Avedisian *v.* May 909,1013

Avina; Dalgety Foods, Inc. *v.* 801,1027

Avitzur *v.* Avitzur 817

A & W Products Co.; DiCarlo *v.* 847

Babbitt Ford, Inc. *v.* Navajo Indian Tribe 1006

Bacchus Imports, Ltd. *v.* Freitas 1015

Bachman; Weston *v.* 824

Bachner *v.* United States 896

Bachtell; Cash *v.* 1046

Badaracco *v.* Commissioner 386,980

Baer Mfg., Inc. *v.* Sheet Metal Workers Pension Plan 994

Bagaric *v.* United States 840

Bagby *v.* Vance 891

Baginsky *v.* United States 981,1074

Bailey *v.* Delaware 867

Bailey; Randall *v.* 842

Bair; Burlington Northern Inc. *v.* 830

Baird *v.* Washington State Dept. of Social & Health Services 843

Baker, *In re* 910

Baker *v.* McKaskle 1048

Baker *v.* United States 844

Baldrige; Washington State Charterboat Assn. *v.* 1053

Baldwin *v.* Winston-Salem 1012

Baliles; Brown *v.* 836

Balk *v.* U. S. Information Agency 821

Balk *v.* U. S. International Communication Agency 892

Balliviero *v.* United States 939

Baltimore & Ohio R. Co.; Lowry *v.* 893

Baltsavias *v.* Heckler 1050

Bank of America National Trust & Savings Assn. *v.* FDIC 935

Bank of Commonwealth; Chapman *v.* 923,1027

Banks, *In re* 889

Banks *v.* Alabama 1010

Banks *v.* Block 934

Banks *v.* Texas 904

Banuelos-Sanchez *v.* United States 996

Barany; Black *v.* 838

Barber; McQueen *v.* 861

Barclay *v.* Florida 874

Barclay Equestrian Center, Inc. *v.* Continental Bank of Pa. 994

Page

Barclays American/Business Credit, Inc.; Quinault Pacific Corp. *v.* 1042
Barefoot *v.* Estelle 874
Barham; Fontana *v.* 1043
Barnes; Adams *v.* 897
Barnes; Owens *v.* 963
Barnett *v.* Falvey 814
Barnett *v.* United States 941,992,1049
Barragan-Cepeda *v.* United States 1001
Barry *v.* New York City 1017
Bartelt; Berlitz Schools of Languages of America, Inc. *v.* 915
Bartlett; Solem *v.* 809
Bartlett; Watson *v.* 819
Bartlett *v.* Williams 801
Bartley *v.* New Jersey 842
Bartolatta *v.* United States 933
Barwick *v.* South Carolina 938,1064
Bashlor *v.* United States 891
Basic Construction Co. *v.* United States 956
Bass *v.* Estelle 865
Batch *v.* Bettis 842
Baton Rouge; Hayes *v.* 983
Baton Rouge; Plain *v.* 896
Battisti *v.* United States 1039
Battle; Meachum *v.* 1006
Battle *v.* Missouri 1306
Baxter, *In re* 910
Baxter *v.* Indiana 1008
Baxter *v.* United States 898
B. D. International Discount Corp. *v.* Chase Manhattan Bank 830
Beadle *v.* McKaskle 1019
Beard; Everett *v.* 833
Beausang *v.* Mullen 827
Bechtel Associates Professional Corp.; Edwards *v.* 995
Bechtel Associates Professional Corp.; Phillippi *v.* 827
Bechtel Inc.; Cheren *v.* 829
Bedortha *v.* Cupp 838
Beemblossom *v.* United States 863
Behrend *v.* Government National Mortgage Assn. 914
Behring International, Inc. *v.* National Labor Relations Bd. 1071
Behul; Regal *v.* 994
Behul; Regal Crest Village of Brookfield *v.* 994
Beil *v.* Illinois 824
Belen Bd. of Ed.; Provoda *v.* 916
Belen Consolidated Schools; Provoda *v.* 916

	Page
Bell *v.* Estelle	855
Bell; Grove City College *v.*	808,1005
Bell *v.* Marshall	997
Bell *v.* Sellevold	1070
Bell *v.* Thigpen	843
Bell Enterprises, Inc. *v.* Donovan	1041
Belnap *v.* Chang	1009
Benally *v.* UNC Resources, Inc.	983
Bender *v.* United States	1052
Benedek; Kish *v.*	999
Benford; Holton *v.*	830
Ben Kozloff, Inc. *v.* Wells Fargo Business Credit	818
Bennett; Prudential Ins. Co. of America *v.*	1008
Bennett *v.* Texas	963
Bennett *v.* Williams	932
Benson *v.* Massachusetts	915
Berdin; Duggan *v.*	893
Beres *v.* Hope Homes, Inc.	937
Bergen *v.* Edenfield	845
Berger; Berry *v.*	818
Berger *v.* McMonagle	1017
Bergman *v.* United States	825
Berick *v.* United States	918
Berkeley; Oakland Raiders *v.*	939
Berkemer *v.* McCarty	1038
Berlitz Schools of Languages of America, Inc. *v.* Bartelt	915
Bernal *v.* Fainter	1007,1036
Bernalillo County District Court; Chavez *v.*	1019
Bernstein; Huang *v.*	837
Berry *v.* Berger	818
Berry; Coloma Community School Dist. *v.*	892
Berry; Fellner *v.*	892
Berry & Gore, Ltd. *v.* Adm'r, Ill. Atty. Reg. & Discip. Comm'n.	1070
Bertrand; International Mooring & Marine, Inc. *v.*	1069
Besadny *v.* Lac Courte Oreilles Band	805
Best *v.* Eagerton	828
Best Seam, Inc.; Carpet Seaming Tape Licensing Corp. *v.*	818
Bethel Park School Dist.; Krall *v.*	851
Bethlehem Steel Corp.; Jameson *v.*	994
Bethlehem Steel Corp.; Vuksta *v.*	835
Betka *v.* West Linn	979
Bettis; Batch *v.*	842
Betts; Koker *v.*	803,1003
Bice-Bey *v.* United States	837

Page
Bidlack; Reiner *v.* 1051
Big Spring Independent School Dist. *v.* Griffen 1008
Bildisco & Bildisco; National Labor Relations Bd. *v.* 912
Billings *v.* Pannucci 842
Billiot *v.* Duncan Crew Boat Rentals, Inc. 898
Billups *v.* Massachusetts 898
Billups *v.* United States 820
Birchfield *v.* General Motors Acceptance Corp. 999
Bishop *v.* Gandy 860
Bissette *v.* South Carolina 828
Bizar, *In re* 958
Black *v.* Barany 838
Black *v.* United States 856
Blair *v.* Boulger 995
Blake; Veenkant *v.* 874,1004
Blanck *v.* McKeen 916
Blanco *v.* United States 1052
Blanton *v.* South Carolina 826
Blatchford *v.* Winans 1033
Blevins *v.* Washington 1043
Bloch *v.* Ambach 914
Block; Banks *v.* 934
Block *v.* Community Nutrition Institute 991
Block; Hopi Indian Tribe *v.* 1056
Block; Navajo Medicinemen's Assn. *v.* 1056
Block *v.* Rutherford 959
Block; Wilson *v.* 956
Bloom; Sutton *v.* 1073
Bloomington Hospital; Infant Doe *v.* 961
Blue Bell, Inc.; Yelverton *v.* 998
Blyden *v.* Government of Virgin Islands 832
Board of Assessors of Marshfield; Fox Ridge Associates & Co. *v.* .. 801
Board of Comm'rs on Grievances and Discipline; Hodges *v.* 960
Board of County Comm'rs of Wash. Cty.; Hagerstown Kitchens *v.* 847
Board of Ed. of Paris Union School Dist. No. 95 *v.* Vail 813
Board of Governors, FRS; Securities Industry Assn. *v.* 812,1015
Board of Higher Ed. of New York City; Linfield *v.* 928,1045
Board of Law Examiners of N. C.; Elkins *v.* 995
Board of Pharmacy of N. J.; Consumer Value Stores *v.* 1065
Board of Regents of Univ. of Okla.; NCAA *v.* 913
Board of Regents of Univ. System of Ga. *v.* Lincoln 826
Board of Review of Utah Industrial Comm'n; Jimena *v.* 845
Board of School Comm'rs of Mobile County *v.* Brown 807,1005
Bobo *v.* DuCharme 961

Page
Boeing Co.; Lui Su Nai-Chao *v.* 1017
Boeing Co.; PRC Harris, Inc. *v.* 936
Bombardier Ltd.; Wolfgram *v.* 829
Bonanno Linen Service, Inc.; McCarthy *v.* 936
Bond *v.* General Motors Corp. 817
Bonded Elevator, Inc. *v.* First American National Bank of Nashville 848
Bonds *v.* Washington 831
Bonner *v.* United States 918
Booker *v.* United States 917
Booker *v.* Wainwright 922
Boothe Financial Corp.; Limbach *v.* 1057
Bordenkircher; Vance *v.* 833
Borman's Inc. *v.* Allied Supermarkets, Inc. 908
Borrelli *v.* Ciccitto 833
Borsari *v.* Federal Aviation Administration 833
Bose Corp. *v.* Consumers Union of United States, Inc. 927
Bostick Oil Co.; Michelin Tire Corp. *v.* 894
Bothman *v.* Engle 841
Botti *v.* United States 996
Bouclin *v.* United States 852,1004
Boulger; Blair *v.* 995
Boulin *v.* United States 1038
Bowers; Georgia Bd. of Naturopathic Examiners *v.* 894
Bowles *v.* Farris 838
Bowring *v.* Warden, Powhatan Correctional Center 934
Boyd *v.* Lehman 1043
Boyd; Robinson *v.* 859
Boyd *v.* Shawnee Mission Pub. Schools, Unified School Dist. No. 512 838
Boylan *v.* U. S. Postal Service 959
Brackman; Veneri *v.* 1050
Bradley; Idaho *v.* 1041
Bradshaw *v.* United States 1009
Brady *v.* Mintzes 897
Branscome, Inc. *v.* United States 806
Bratton *v.* Detroit 1040
Breed; Wintrey *v.* 836
Breed & Associates; Wintrey *v.* 836
Breitegan *v.* Pennsylvania 991
Brennan *v.* Los Angeles 821
Brezenoff; Hammerhead Enterprises, Inc. *v.* 892
Bricklayers; Halsell *v.* 895
Bridges *v.* Cape Publications, Inc. 893
Bridges *v.* Texas 838,1004
Briece *v.* Briece 850

Page
Brier; Salinas *v.* 835
Brierton; Hudson *v.* 833
Briggs *v.* Goodwin 1040
Briggs; Ronan *v.* 836,1003
Brimm *v.* United States 888,1044
Brislawn *v.* Brislawn 1040
Brister *v.* Jefferson Parish 822
Brodnex *v.* Estelle 835
Brookfield Village; Kuellmar *v.* 823
Brooks *v.* United States 1072
Brotherhood. For labor union, see name of trade.
Brown, *In re* 1006
Brown *v.* Atlanta 827
Brown *v.* Baliles 836
Brown; Board of School Comm'rs of Mobile County *v.* 807,1005
Brown *v.* Douglas 985,1064
Brown *v.* Globe Democrat Publishing Co. 928
Brown *v.* Herald Co. 928
Brown *v.* Hopper 1000
Brown *v.* Hotel Employees 990
Brown *v.* Lutheran Hospital Society of Southern California 856,987
Brown *v.* Marshall 835
Brown *v.* Parker 815
Brown *v.* Republic Steel Corp. 891
Brown *v.* Rice 1019
Brown *v.* Santa Monica Hospital Medical Center 856,987
Brown *v.* Schacht 1002
Brown *v.* United States 898,940,1019
Brown *v.* Wainwright 1019
Brownfield *v.* Laguna Beach 894,1004
Brown & Root, Inc.; Lewis *v.* 1069
Brown & Root, Inc. *v.* Thornton 1052
Bruce *v.* McKaskle 963
Bruce *v.* Upper East Tenn. Human Development Agency, Inc. 854,1004
Brummer *v.* Florida *ex rel.* Smith 823
Brunty *v.* United States 848
Bryant, Inc. *v.* National Labor Relations Bd. 1039
Bucci, *In re* 807
Budde *v.* Kentron Hawaii, Ltd. 828
Buffalo Forge Co. *v.* Ogden Corp. 1018
Buford *v.* Wainwright 956
Building & Construction Trades Dept. *v.* Donovan 1069
Bujol *v.* Cain 1049
Bull Valley Management Co.; Wold *v.* 936

Page
Bunch *v.* Virginia 977,1064
Bunkfeldt Broadcasting Corp. *v.* Federal Communications Comm'n 814
Burciaga; New Mexico *ex rel.* "One Minute of Silence" Statute *v.* . 982
Bureau of Alcohol, Tobacco and Firearms *v.* FLRA 89
Bureau of Hearings and Appeals; Chocallo *v.* 983
Burke *v.* United States 816
Burke Distributing Co. *v.* Massachusetts 957
Burkhart; Toneman *v.* 838
Burlington Northern Inc. *v.* Bair 830
Burlington Northern R. Co. *v.* Lennen 1067
Burlington Northern R. Co. *v.* United States 909
Burnett *v.* Grattan 981
Burnette *v.* Ponte 941
Burns; Equitable Life Assurance Society of United States *v.* 933
Burns & Russell Co. of Baltimore; California Glazed Products *v.* .. 938
Burrell *v.* Sacramento County 893
Burroughs Corp. *v.* A. B. Dick Co. 1042
Burton; Children *v.* 848
Burton *v.* Pacific Far East Lines, Inc. 852
Burton *v.* United States 857
Bush *v.* Alabama 865
Bustamante *v.* United States 856
Bustamante-Cuadros *v.* United States 996
Butler, *In re* 925
Butterworth; Jackson *v.* 916,1027
B & W Transportation *v.* Massachusetts 957
Byers *v.* United States 1046
Byrum *v.* Lowe & Gordon, Ltd. 961
Byrum *v.* Patterson 961
Cagnina *v.* United States 856
Cain; Bujol *v.* 1049
Cairo, *In re* 958
Calderon *v.* Department of Army 998
Caldevilla *v.* United States 1018
California; Aguirre *v.* 962
California; Arizona *v.* 888
California *v.* Carroll 820
California; Clark *v.* 1065,1304
California; Duran *v.* 991
California; Gonzalez *v.* 1033
California; Green *v.* 1046
California *v.* Harvier 820
California; Haynes *v.* 1009
California; Holcomb *v.* 840,1004

Page
California; Madera *v.* 997
California; Martin *v.* 899
California; Miller *v.* 843
California; Moreno *v.* 984
California; Pipinos *v.* 1072
California; Schulz *v.* 838
California *v.* Secretary of Interior 312
California; Secretary of Interior *v.* 312
California *v.* Standard Oil Co. of California 811,1068
California *v.* Trombetta 1037
California *v.* United States 1013
California; Waters *v.* 1048
California; Western Oil & Gas Assn. *v.* 312,1065,1304
California; Woo Chin Tong *v.* 850
California; Yu *v.* 1072
California *ex rel.* State Lands Comm'n; Summa Corp. *v.* 888
California Glazed Products, Inc. *v.* Burns & Russell Co. of Baltimore 938
Caliguri *v.* United States 991
Callahan; Fresh Pond Shopping Center, Inc. *v.* 875
Callahan *v.* United States 840
Callahan *v.* Young 863
Camer *v.* Eikenberry 828
Camic; State Bank of St. Charles *v.* 995
Campaign Finance Disclosure Comm'n; Iowans for Tax Relief *v.* 879
Campbell *v.* Guy 1051
Campbell *v.* Heckler 1049
Canadian Hidrogas Resources, Ltd. *v.* MGPC, Inc. 961
Canel *v.* United States 852
Canine Eye Registration Foundation, Inc.; Rickards *v.* 994
Canion, *In re* 1006
Cannon *v.* United States 1045
Cantagallo, *In re* 911,1034
Canter; Mann *v.* 932
Cantrell *v.* Florida 1047
Cantrell *v.* Rosa 821
Cape Publications, Inc.; Bridges *v.* 893
Capital Cities Cable, Inc. *v.* Crisp 813,989,1015
Caran *v.* United States 845
Cardillo *v.* United States 1010
Cardosa *v.* Morales 819
Career Service Council of Wyo.; Atchison *v.* 982
Carey; New York Assn. for Retarded Children, Inc. *v.* 915
Caribe Tugboat Corp. *v.* Duffy 1041
Carlsen *v.* Morris 854

Page
Carnicle *v.* Fox 847
Carpenter *v.* Hammond 801
Carpenter *v.* Scoppa 962
Carpenters; Pratt-Farnsworth, Inc. *v.* 932
Carpenters *v.* Scott 875
Carpenters Pension Trust for So. Cal. *v.* Shelter Framing Corp. 912
Carpenters Vacation & Holiday Trust Fund; Associated Builders *v.* 825
Carpet Seaming Tape Licensing Corp. *v.* Best Seam, Inc. 818
Carrico *v.* United States 1071
Carrithers; Terramar Beach Community Improvement Assn., Inc. *v.* 981
Carroll; California *v.* 820
Carroll *v.* United States 1008
Carter *v.* Small Business Administration 1043
Carter *v.* United States 986
Carter Enterprises of Denver *v.* Small Business Administration 1043
Cascante-Bernitta *v.* United States 898
Case *v.* United States 824
Cash *v.* Bachtell 1046
Casoria *v.* United States 896
Castaneda-Reyes *v.* United States 856
Castano *v.* United States 825
Castillo; Givens *v.* 850
Castillo *v.* United States 925
Castro *v.* Federal Deposit Ins. Corp. 964,1027
Catanese *v.* United States 996
Catholic Home Bureau *v.* Doe 864
Caton *v.* Caton 1042
Cauble *v.* United States 941
Cauley *v.* Henderson 897
Cavanaugh *v.* United States 853
Cavazos *v.* United States 1071
CBS Musical Instruments; Olsen *v.* 892
Ceniceros *v.* United States 985
Central National Bank of Poteau *v.* Coal Washer Rental Corp. 817
Central States, S. E. & S. W. Areas Pens. Fund *v.* Central Transp. 810
Central Transp.; Central States, S. E. & S. W. Areas Pens. Fund *v.* 810
Centran Corp.; Marx *v.* 995
Chaffee *v.* United States 915
Chagra, *In re* 912,1066
Chang; Belnap *v.* 1009
Chapin *v.* Marshall 1047
Chapman *v.* Bank of Commonwealth 923,1027
Charapata *v.* United States 827
Charles D. Bonanno Linen Service, Inc.; McCarthy *v.* 936

Page
Chase Foundry & Mfg. Co. *v.* Ohio 823
Chase Manhattan Bank; B. D. International Discount Corp. *v.* 830
Chase Manhattan Bank; Nesglo, Inc. *v.* 935
Chase Manhattan Bank *v.* Sand 1005
Chavez *v.* Bernalillo County District Court 1019
Chavez *v.* Smith 823
Cheechako Leasing Co. *v.* Workers' Compensation Appeals Bd. 894
Cheren *v.* Bechtel Inc. 829
Chernack *v.* United States 986,1001
Chesapeake & Ohio R. Co. *v.* Schaaf 848,987
Chesapeake & Potomac Tel.; Norfolk Redev. & Housing Auth. *v.* 30
Chesson *v.* United States 856
Chestnut Lodge, Inc.; Kappas *v.* 852
Chevron Chemical Co. *v.* Gilmore 814
Chevron U.S.A. Inc. *v.* Natural Resources Defense Council, Inc. 927
Chiago *v.* United States 854
Chicago; Rasky *v.* 874
Chicago Bridge & Iron Co. *v.* Washington Dept. of Revenue 1013
Chicago & Eastern Ill. R. Co.; Peterson *v.* 1009
Chicago & North Western Transp. Co.; Hayfield Northern R. *v.* 812,1015
Chick Kam Choo *v.* Esso Oil Co. 826
Chief Judge, Circuit Court of Greene County; Manis *v.* 1048
Chief U. S. District Judge; Smith *v.* 859
Children *v.* Burton 848
Childress *v.* Ohio 853
Childress *v.* United States 1063
Chin Tong *v.* California 850
Chitimacha Tribe *v.* Harry L. Laws Co. 814
Chocallo *v.* Bureau of Hearings and Appeals 983
Choo *v.* Esso Oil Co. 826
Christenson *v.* Headley 835
Christiansen *v.* Texas 985
Chrysler Corp.; Galanty *v.* 826
Chuck; Giuliani *v.* 803
Church of Christ of Collinsville *v.* Graham 821
Church of Scientology of Portland *v.* Rudie 932
Chylicka *v.* United States Catholic Conference "Caritas" 1019
Ciancaglini *v.* United States 849
Ciccitto; Borrelli *v.* 833
Cicconi *v.* United States 1018
Cina *v.* United States 991
Cincinnati City School Dist. Bd. of Ed. *v.* Roncker 864
Cinelli *v.* Massachusetts 860
Circuit Judge, Muskegon County; Billings *v.* 842

Page
Circuit Judge, 19th Jud. Cir. v. Fla. Dept. of Health & Rehab. Servs. 1073
Citadel Corp. v. Puerto Rico Highway Authority 815
City. See name of city.
Clackamas County Housing Authority v. Telford................ 1070
Clark v. Arizona Interscholastic Assn. 818
Clark v. California 1065,1304
Clark v. Community for Creative Non-Violence 1016
Clark v. Dole.. 1038
Clark; Doria Mining & Engineering Corp. v. 1071
Clark; Gentsch v. 1051
Clark; James v. 1016
Clark v. Marston 874,987
Clark; Mashpee Tribe v. 1020
Clark; Smith v. 859
Clark v. United States 861,942
Clark; Yavapai-Prescott Indian Tribe v. 1017
Clark Equipment Co. v. Keller.................................. 1044
Clarksdale Baptist Church v. Green 807
Claxton v. Copeland 1074
Clayco Petroleum Corp. v. Occidental Petroleum Corp........... 1040
Clayton v. Texas 1046
Clementi v. Scully 833
Clemmons v. Johnson Brothers Wholesale Liquor Co. 936
Cleveland Elec. Illuminating Co. v. Public Util. Comm'n of Ohio.. 802
Clifford; Michigan v. 287
Clooney v. Harrisville... 909
Clymer; Davis v. 1000
Coahoma Bank v. Willey 849
Coal Washer Rental Corp.; Central National Bank of Poteau v. .. 817
Coastal Resources Management; Schwarz v. 823,978
Coastal Steel Corp. v. Wheelabrator-Frye, Inc.................. 938
Coats v. Allsbrook 897
Cobb E. N. T. Associates, P. C.; Dobbs v. 845
Coburn v. Pan American World Airways, Inc...................... 994
Coconut Creek Cable T.V., Inc.; Wynmoor Ltd. Partnership v. .. 1033
Coe v. Tennessee 1063
Cohen, *In re* 1014
Cohen v. Smith.. 939
Cojanis v. Cojanis 924
Cole v. Georgia... 959
Coleman v. McCarthy 832
Coleman v. Oklahoma 1073
Coleman v. United States 854
Collier; Daniel v. 805

Page
Collins, *In re* 910
Coloma Community School Dist. *v.* Berry 892
Colorado *v.* New Mexico 927
Colorado *v.* Nunez 812,989
Colorado *v.* Quintero 810,1014
Colorado; Wagner *v.* 829
Colorado; White *v.* 998
Colorado River Indian Tribes *v.* Aranson 982
Columbia *v.* Paul N. Howard Co. 893
Columbia Poly Pack Co. *v.* Vernon 850
Commercial Union Ins. Co.; Demos *v.* 827
Commissioner; Allen *v.* 1018
Commissioner; American International Coal Co. *v.* 892
Commissioner; Badaracco *v.* 386,980
Commissioner; Dale *v.* 1044
Commissioner; Desert Palace, Inc. *v.* 816
Commissioner; Ducommun *v.* 939
Commissioner *v.* Engle 206
Commissioner; Gryder's Estate *v.* 1008
Commissioner; Joseph Gann, Inc. *v.* 821
Commissioner; Knighten *v.* 897
Commissioner; Latchis *v.* 833
Commissioner; Lewellen *v.* 803
Commissioner; Ocean Sands Holding Corp. *v.* 827
Commissioner; Paul *v.* 1041
Commissioner; Pius XII Academy, Inc. *v.* 982,1064
Commissioner; Salman *v.* 857
Commissioner; Tilford *v.* 992
Commissioner; Warren *v.* 830
Commissioner; Washington *v.* 985
Commissioner; Wheeling *v.* 862,1005
Commissioner; Wilson *v.* 987
Commissioner of Ins.; American Family Life Assurance Co. *v.* 850
Commissioner of Internal Revenue. See Commissioner.
Commissioner of Public Health of Mass.; C. P. Chemical Co. *v.* 923
Commissioner of Revenue of Ala.; Exxon Corp. *v.* 801
Commissioner of Revenue of Ala.; Union Oil Co. of California *v.* 801
Commissioner of Revenue of Minn.; Pickands Mather & Co. *v.* 1069
Commission on Judicial Performance of Cal.; Gonzalez *v.* 1033
Committee for an Independent P–I *v.* Smith 892
Committee to Preserve American Color Television *v.* United States 825
Commonwealth. See name of Commonwealth.
Commonwealth Edison Co. *v.* Getto 815
Community for Creative Non-Violence; Clark *v.* 1016

Page
Community for Creative Non-Violence; Watt *v.* 812
Community Health Services of Crawford County, Inc.; Heckler *v.* 812,980
Community Nutrition Institute; Block *v.* 991
COMPACT *v.* United States 825
Conger *v.* Louisiana 1050
Coniglio *v.* Warden, Clinton Correctional Facility 822
Conley *v.* United States 1001
Connecticut; Aillon *v.* 837
Connecticut; Davis *v.* 938
Connecticut *v.* Ubaldi 916
Connecticut Bank & Trust Co.; Davidson *v.* 1042
Conner *v.* Georgia 865,1005
Connor *v.* United States 941
Conrad; Stevenson *v.* 857,978
Consolidated Foods Corp.; Unger *v.* 1017
Consolidated Rail Corp.; Putney *v.* 938
Consolidation Coal Co.; Mine Workers *v.* 993
Constant *v.* United States 1041
Construction Laborers *v.* Paul E. Iacono Structural Engineer, Inc. 851
Consumers Union of United States, Inc.; Bose Corp. *v.* 927
Consumer Value Stores *v.* Board of Pharmacy of N. J. 1065
Container Corp. of America *v.* Franchise Tax Bd. 909
Conti *v.* Ingersoll Rand Co. 1049
Continental Airlines, Inc. *v.* Zimmerman 1038
Continental Assur. Co.; Pressroom Unions-Printers League Fund *v.* 845
Continental Bank of Pa.; Barclay Equestrian Center, Inc. *v.* 994
Control Laser Corp.; Gould *v.* 935
Conway *v.* United States 1008
Coody *v.* Louisiana 846
Cook *v.* Department of Labor 832
Cook; Veenkant *v.* 1009,1074
Cooling Systems & Flexibles, Inc.; Stuart-Western, Inc. *v.* 962
Cooper *v.* Federal Reserve Bank of Richmond 932,1067
Cooper *v.* Florida 1073
Coopers & Lybrand; Hydroculture, Inc. *v.* 986
Copeland; Claxton *v.* 1074
Copenhaver *v.* Harris Enterprises, Inc. 846
Copperweld Corp. *v.* Independence Tube Corp. 809
Corhart Refractories Co.; Royse *v.* 1072
Cormier; Oceanic Contractors, Inc. *v.* 821
Corporation of St. Mary's College, Notre Dame; Ostric *v.* 936,1064
Correa-De Jesus *v.* United States 1010
Corrections Commissioner. See name of commissioner.
Corricelli *v.* United States 895,1001

Page
orsiglia; Veenkant *v.* 874
ortez *v.* New Mexico 964
osmopolitan Shipping Co.; Leone *v.* 895
osoff *v.* Rodman 822
osta *v.* Markey 1017
oulter *v.* Alabama 925
ouncil of Better Bus. Bureaus; Nat. Found. for Cancer Research *v.* 830
ounty. See name of county.
ourt House Plaza Co. *v.* Palo Alto 935
ourtney, *In re* 811
ox; Thomas *v.* 918
ox *v.* United States 827
oxwell *v.* Fortner 855
oyne *v.* Weinberger 818
. P. Chemical Co. *v.* Commissioner of Public Health of Mass. 923
raig *v.* North Carolina 908
raig *v.* United States 934
rane, *In re* 807
rane *v.* Michigan 804
rawford *v.* United States 894
rawford County; Skaggs *v.* 1019
reason *v.* Mo-Kan Teamsters Pension Fund 1045
reel *v.* United States 1044
risp; Capital Cities Cable, Inc. *v.* 813,989,1015
risto Rey Community Center; Ruiz *v.* 828
rooker *v.* Internal Revenue Service 857
rosby *v.* United States 1001,1045
ross *v.* Secretary of State 928,1016
ross *v.* United States 996
rouch *v.* Heckler 898
rowder *v.* Texas 1013
rowe *v.* Georgia 1068
ruz *v.* United States 916
serenyi *v.* New York 985
ulver *v.* United States 899
unningham & O'Connor Mortuary; De Nobili *v.* 1050
upp; Bedortha *v.* 838
upp; Ruiz *v.* 938
urry; Taylor *v.* 1000
urtis *v.* Heckel 834
utts *v.* Wyrick 1011
uyahoga Valley Homeowners Assn. *v.* Secretary of Interior 1008
uyler; Hall *v.* 836
aily Income Fund, Inc. *v.* Fox 523

	Page
Dale *v.* Commissioner	1044
Dalgety Foods, Inc. *v.* Avina	801,1027
Dallas; Wachsman *v.*	1012
Dallas County Comm'rs Court *v.* Richardson	1009
D'Alleman *v.* United States	899
Dalton *v.* R. W. T.	1009
Damico *v.* United States	847
Dampier *v.* Illinois	940
Daniel *v.* Collier	805
Daniels *v.* Mintzes	983
Daniels *v.* Oklahoma	844
Daniunas; Simutis *v.*	822
Dantzler *v.* South Carolina	1044
Danziger *v.* Hotel Employees	990
Davenport *v.* Zimmerman	854
David *v.* Attorney General	832
Davidson *v.* Connecticut Bank & Trust Co.	1042
Davis, *In re*	925
Davis *v.* Clymer	1000
Davis *v.* Connecticut	938
Davis; Edwards *v.*	860
Davis; Frank *v.*	847
Davis *v.* Gladstone	1052
Davis *v.* Illinois	1001,1074
Davis; Lewis *v.*	843
Davis *v.* McKaskle	999,1010
Davis *v.* McKenzie	855
Davis *v.* Missouri	962
Davis *v.* Oklahoma	865,933
Davis *v.* Pennsylvania	848
Davis *v.* Scherer	1017
Davis; Tatu *v.*	979
Davis *v.* United States	998,1001,1034
Davis *v.* Weldon	896
Dawson, *In re*	1005
Dawson; Robinson *v.*	840
Dayan; Adams *v.*	934
Daye *v.* Attorney General of N. Y.	1048
Deakyne *v.* Department of Army Corps of Engineers	818
Deal *v.* Wainwright	858
Dean *v.* Trans World Airlines, Inc.	995
Dean *v.* United States	1014
DeAndrea *v.* Florida	843
Dearing, *In re*	812

Page
Deavers *v.* Illinois 832
Decatur; Ehlers *v.* 824
Decker Coal Co.; Austin *v.* 938
Defense Logistics Agency; Wright *v.* 817
Defex *v.* Pan American World Airways, Inc. 826
Deist; Adams Central School Dist. No. 090 *v.* 893
De La Rosa *v.* Texas 865,1064
Delaware; Bailey *v.* 867
Delaware; Doyle *v.* 858
Delaware; Flamer *v.* 865
Deleet Merchandising Corp. *v.* United States 386,980
Delegal *v.* United States 1013
Delgado, *In re* 1057
Delta Farms Reclamation Dist. No. 2028 *v.* Fernandez 915
Delta Farms Reclamation Dist. No. 2028 *v.* Superior Court 915
Demos *v.* Commercial Union Ins. Co. 827
Demyan's Hofbrau, Inc. *v.* INA Underwriters Ins. Co. 820
Den Norske Amerikalinje; Sikorski *v.* 1048
De Nobili *v.* Cunningham & O'Connor Mortuary 1050
Denton; Edwards *v.* 942
Department of Agriculture; Federal Labor Relations Authority *v.* 1007
Department of Army; Calderon *v.* 998
Department of Army Corps of Engineers; Deakyne *v.* 818
Department of Corrections; Draper *v.* 891
Department of Health and Mental Hygiene; Reid *v.* 843
Department of Housing and Urban Development; Eno *v.* 928,1016
Department of Labor; Cook *v.* 832
Department of Personnel of New York City; Lee *v.* 835
Department of Rehabilitative Services of Va.; Levy *v.* 854
Department of Revenue of Mont.; Russell Stover Candies, Inc. *v.* 988
Department of Social Services; Fair *v.* 941
Department of State *v.* Washington Post Co. 812,979
Department of Treasury; American Jewish Congress *v.* 895
DeRobertis; Williams *v.* 1072
Desert Hospital Dist. of Palm Springs; Unterthiner *v.* 928,1068
Desert Palace, Inc. *v.* Commissioner 816
Desmond, *In re* 927,1066
Detco Trailer, Inc.; Hochanadel *v.* 822
Detroit; Bratton *v.* 1040
Deukmejian; H. J. Justin & Sons, Inc. *v.* 823
Deukmejian; Justin Boot Co. *v.* 823
DeVincent *v.* Verdeyen 899
DeVincentis; Gaunce *v.* 978
DeVRY Inc. *v.* McClandon 936

	Page
Dew *v.* Florence	936
DiCarlo *v.* A & W Products Co.	847
Dick *v.* Kemp	986,1064
Dick Co.; Burroughs Corp. *v.*	1042
Dill *v.* United States	823
Dillon *v.* Florida	853
Director of Cal. Dept. of Social Services *v.* Zapata	827
Director, OWCP; E-Systems, Inc. *v.*	956
Director of penal or correctional institution. See name or title of director.	
Director of Taxation of Haw.; Aloha Airlines, Inc. *v.*	7
Director of Taxation of Haw.; Bacchus Imports, Ltd. *v.*	1015
Director of Taxation of Haw.; Hawaiian Airlines, Inc. *v.*	7
Diron *v.* Eastlake	1042
District Court. See also U. S. District Court.	
District Court, Jefferson County, Colo.; Anderson *v.*	1051
District Judge. See U. S. District Judge.	
District Lodge. For labor union, see name of trade.	
District of Columbia Court of Appeals *v.* Feldman	808
District School Bd. of Hernando County; Johnson *v.*	851,1004
Division of Administration, Fla. Dept. of Transp.; Tsanos *v.*	852,1004
Division of Military and Naval Affairs of N. Y.; FLRA *v.*	1007
Dixon *v.* Dixon	821
Dixon; McQueen *v.*	1049
Dixon *v.* Missouri	1072
Dixon; Sommer *v.*	857
Dixon *v.* United States	850,939
DMR Corp. *v.* National Labor Relations Bd.	852
Dobard *v.* Alabama	1063
Dobbs *v.* Cobb E. N. T. Associates, P. C.	845
Dobson *v.* United States	831
Dock *v.* Smith	854
Dodd *v.* Oklahoma	857
Dodson *v.* Illinois	840
Doe; Catholic Home Bureau *v.*	864
Doe *v.* Executive Securities Corp.	818
Doe *v.* United States	978
Dole; Clark *v.*	1038
Dollar *v.* Haralson County	963
Dominique *v.* Greer	836
Donaldson *v.* United States	838
Donnell *v.* Freeman	941,1027
Donovan; Building & Construction Trades Dept. *v.*	1069
Donovan *v.* Lone Steer, Inc.	408

Page
Donovan; Master Printers Assn. *v.* 1040
Donovan; Mazzola *v.* 1040
Donovan; Metal Recycling Co. *v.* 849,1004
Donovan; Robert K. Bell Enterprises, Inc. *v.* 1041
Donovan; Saavedra *v.* 892
Donovan *v.* San Antonio Metropolitan Transit Authority 812,989,1035
Donovan; Varkonyi *v.* 849,1004
Doria Mining & Engineering Corp. *v.* Clark 1071
Dorsey *v.* Maggio 832
Douglas; Brown *v.* 985,1064
Dowdy *v.* Ohio 840
Dow Jones & Co., Inc.; Safecard Services, Inc. *v.* 831
Downes, *In re* 958
Doyle *v.* Delaware 858
Draper *v.* Department of Corrections 891
Drawdy, *In re* 958
Drey *v.* United States 827
Dreyer; Hirschfeld *v.* 816
Drinkwine *v.* United States 862
Drobny, *In re* 1066
Drouillard *v.* United States 850
DuCharme; Bobo *v.* 961
Duckett *v.* Raines 908
Duckworth; Holleman *v.* 834
Ducommun *v.* Commissioner 939
Duerr *v.* Ohio 816
Duffell *v.* United States 896
Duffy; Caribe Tugboat Corp. *v.* 1041
Dugar *v.* Abrams 898
Dugar *v.* Maggio 985
Duggan *v.* Berdin 893
Dugger; Walker *v.* 918
Dun & Bradstreet, Inc. *v.* Greenmoss Builders, Inc. 959
Duncan *v.* Alabama 1047
Duncan *v.* Huntington Park Redevelopment Agency 895
Duncan *v.* Kentucky 998
Duncan Crew Boat Rentals, Inc.; Billiot *v.* 898
Dunham; Nell *v.* 836
Dunlap *v.* Illinois 802
Dunn; Wilson *v.* 999
Du Pont de Nemours & Co.; Harden *v.* 937
Duran *v.* California 991
Durham County Bd. of Alcoholic Control *v.* Wells 1044
Dyas; Lockhart *v.* 982

Page
Dysart *v.* United States 934
Eagerton; Best *v.* 828
Eagerton; Exxon Corp. *v.* 801
Eagerton; Union Oil Co. of California *v.* 801
Earle M. Jorgenson Co. *v.* Seattle 982
Early *v.* Eastern Transfer 824
Eastern Air Lines, Inc.; Arnold *v.* 1040
Eastern Air Lines, Inc. *v.* Atlantic Richfield Co. 915
Eastern Foods, Inc. *v.* R. C. McEntire & Co. 849
Eastern Transfer; Early *v.* 824
Eastlake; Diron *v.* 1042
Eastman Kodak Co.; Foremost Pro Color, Inc. *v.* 811
East Orange; Graham *v.* 1051
Eberle; Kincaid *v.* 1018
Eboli *v.* United States 962
Edenfield; Bergen *v.* 845
Edgington *v.* New Mexico 940
Edmond *v.* Nelson 1066
Edwards, *In re* 935
Edwards *v.* Bechtel Associates Professional Corp. 995
Edwards *v.* Davis 860
Edwards *v.* Denton 942
Edwards *v.* Parke 845
Edwards *v.* United States 858
Edwards, Inc.; New England Toyota Distributors, Inc. *v.* 894
Egger *v.* Phillips 918
Ehlers *v.* Decatur 824
Ehnes *v.* United States 898
E. I. du Pont de Nemours & Co.; Harden *v.* 937
Eikenberry; Camer *v.* 828
Eisenbeiss *v.* Jarrell 820
Eken *v.* International Mining Exchange, Inc. 815
El-Amin *v.* Government of Virgin Islands 831,987
Electrical Workers *v.* Ingram 937
Electrical Workers *v.* National Labor Relations Bd. 950
Electrical Workers *v.* Public Utilities Comm'n of Cal. 1056
Electronic Currency Corp. *v.* Western States Bankcard Assn. 983
Eley; Alabama *v.* 820
Eliasen *v.* Green Bay & Western R. Co. 874
Elkins *v.* Board of Law Examiners of N. C. 995
Elledge *v.* Florida 986
Ellerthorpe; Souza *v.* 1048
Elliott *v.* Elliott 923
Ellis *v.* Railway Clerks 809

Page
Elser; I. A. M. National Pension Fund *v.* 813
Engle; Bothman *v.* 841
Engle; Commissioner *v.* 206
Engle; Koehler *v.* 890
Engle *v.* New York Human Rights Appeal Bd. 841,1004
Engle; Sumlin *v.* 834
Ennis *v.* North Dakota 992
Ennis *v.* United States 992
Eno *v.* Department of Housing and Urban Development 928,1016
Environmental Designs, Ltd. *v.* Union Oil Co. of California 1043
EPA *v.* Northern Plains Resource Council 806
EEOC; First Catholic Slovak Ladies Assn. *v.* 819
EEOC; Kemp *v.* 1048
EEOC; Los Angeles County *v.* 1073
EEOC; Michael Construction Co. *v.* 1038
Equitable Life Assurance Society of United States *v.* Burns 933
Erftmier *v.* Rowan Cos. 1044
Erie County; Salsbury *v.* 825
Erie Ins. Exchange; Grant *v.* 938
Erlbaum *v.* Morgenthau 993
Ernst *v.* Indiana Bell Telephone Co. 1041
Escambia County *v.* McMillan 830,980,988,1014
Escondido Mutual Water Co. *v.* La Jolla Band of Mission Indians 913,1067
Esgate *v.* United States 1019
Esso Oil Co.; Chick Kam Choo *v.* 826
Estate. See name of estate.
Estelle; Autry *v.* 1,925,1301
Estelle; Barefoot *v.* 874
Estelle; Bass *v.* 865
Estelle; Bell *v.* 855
Estelle; Brodnex *v.* 835
Estelle; Gordon *v.* 858
Estelle; Hernandez *v.* 844
Estelle; Holloway *v.* 891
Estelle; Luera *v.* 834
Estelle; Roberson *v.* 934
Estelle; Starling *v.* 842
Estelle; Trussell *v.* 853
Estelle *v.* Wiggins 809
Estlack *v.* United States 859
Estrada-Ramirez *v.* United States 841
E-Systems, Inc. *v.* Director, OWCP 956
Euge *v.* United States 1047
Evans *v.* New York 1018

Page
Evans *v.* Texas 925
Evans *v.* Wainwright 860
Evanston *v.* Lubavitch Chabad House of Illinois, Inc. 992
Everett *v.* Beard 833
Everitt *v.* Marshall 894
Ewing *v.* United States 997,1064
Ewing, Cole, Erdman & Eubank; Travelers Indemnity Co. *v.* 1041
Executive Securities Corp.; Doe *v.* 818
Exxon Corp. *v.* Eagerton 801
Fadell *v.* United States 829
Fainter; Bernal *v.* 1007,1036
Fair; Arruda *v.* 999
Fair *v.* Department of Social Services 941
Fairdale Farms, Inc. *v.* Yankee Milk, Inc. 1043
Fair Grounds Corp. *v.* Pari-Mutuel Clerks 846
Faison *v.* Thornton 896
Fakier *v.* United States 824
Falkenhan *v.* Pennsylvania 803
Falkowski *v.* Perry 819,1003
Falvey; Barnett *v.* 814
Falzon; Volkswagenwerk A. G. *v.* 811
Farber *v.* Oregon 987
Fargo; Minch *v.* 829
Farmar *v.* United States 206
Farmer; Fort Lauderdale *v.* 816
Farmer *v.* United States 861
Farris; Bowles *v.* 838
Faulkenberry; Kansas City Southern R. Co. *v.* 850
Faulkner *v.* Kelly 843
Faulkner *v.* Merritt 986
Fears *v.* United States 841,897
Federal Aviation Administration; Borsari *v.* 833
Federal Aviation Administration; Landy *v.* 895
Federal Bureau of Investigation; McAdoo *v.* 941
Federal Bureau of Investigation; Vella *v.* 1050
Federal Bureau of Prisons, Theriault *v.* 862
Federal Communications Comm'n; Bunkfeldt Broadcasting Corp. *v.* 814
Federal Communications Comm'n *v.* ITT World Communications 932
Federal Communications Comm'n; Loveday *v.* 1008
Federal Communications Comm'n; West Coast Media, Inc. *v.* 816
Federal Deposit Ins. Corp., Bank of America Nat. Tr. & S. Assn. *v.* 935
Federal Deposit Ins. Corp.; Castro *v.* 964,1027
Federal Energy Regulatory Comm'n; Gulf Oil Corp. *v.* 1038
FLRA; Bureau of Alcohol, Tobacco and Firearms *v.* 89

Page

FLRA *v.* Department of Agriculture 1007
FLRA *v.* Division of Military and Naval Affairs of N. Y. 1007
FLRA *v.* Florida National Guard 1007
Federal Mine Safety & Health Rev. Comm'n; Smitty Baker Coal *v.* 851
Federal Reserve Bank of Richmond; Cooper *v.* 932,1067
Federal Trade Comm'n; Grolier Inc. *v.* 891
Fehlhaber *v.* Fehlhaber 818
Feinberg *v.* United States 1007
Feinerman; Inglis *v.* 1040
Feldman; District of Columbia Court of Appeals *v.* 808
Feldman *v.* United States 939
Feliciano *v.* Lane 1010
Felix *v.* New York 802
Fellner *v.* Berry 892
Fellows; Universal Restaurants, Inc. *v.* 828
Fenn; Harris *v.* 1044
Ferguson *v.* Johnson 960
Ferguson; Lesiak *v.* 826,1064
Ferguson Reorganized School Dist. R–2; MacDonald *v.* 961
Fernandez; Delta Farms Reclamation Dist. No. 2028 *v.* 915
Fernandez *v.* United States 852
Ferola *v.* Moran 839
Ferrante *v.* United States 991
Ferris *v.* United States 823
Fidelity Construction Co. *v.* United States 826
Field Container Corp. *v.* Interstate Commerce Comm'n 1039
Field Enterprises, Inc.; Antonelli *v.* 1072
Fields *v.* United States 898,983,998
Fields *v.* Wyrick 1020
Figueroa *v.* United States 852
Filco *v.* Amana Refrigeration, Inc. 956
Filipas *v.* Akron General Hospital 999
Filipas *v.* Krause 999
Fillmore *v.* Alabama 938
Finch *v.* United States 963,1018
Finney *v.* Michigan Dept. of Social Services 923,1064
Firefighters *v.* Stotts 808
First American National Bank of Nashville; Bonded Elevator, Inc. *v.* 848
First American Title Co. of S. D. *v.* South Dakota Land Title Assn. 1042
First Arabian Corp., S.A. *v.* Pharaon 892
First Catholic Slovak Ladies Assn. *v.* EEOC 819
First National Bank & Trust Co. of Evanston *v.* Rosewell 803
First Security Bank of Utah; Hackford *v.* 827
Fisher; Anderson *v.* 802

Page
... 893
Fisher; Ivey *v.* ... 959
Fisher *v.* Larsen ... 959
Fisher; Larsen *v.* ... 858
Fisher *v.* United States ... 852
Fitterer *v.* United States ... 963,1064
Fitzpatrick *v.* Smith ... 865
Flamer *v.* Delaware ... 859
Fleming *v.* Oklahoma ... 918
Flemmings *v.* New Jersey ... 1049
Fleshman *v.* Heckler ... 846
Fleury *v.* Harper & Row, Publishers, Inc. ... 936
Florence; Dew *v.* ... 898,1005
Flores *v.* Aranguren ... 1037
Florida, *In re* ... 865
Florida; Armstrong *v.* ... 874
Florida; Barclay *v.* ... 1047
Florida; Cantrell *v.* ... 1073
Florida; Cooper *v.* ... 843
Florida; DeAndrea *v.* ... 853
Florida; Dillon *v.* ... 986
Florida; Elledge *v.* ... 1052
Florida; Foster *v.* ... 933
Florida; Garbin *v.* ... 820
Florida *v.* Gragg ... 1018
Florida; Herring *v.* ... 1048
Florida; Johnson *v.* ... 891
Florida; Jones *v.* ... 865
Florida; Magill *v.* ... 1071
Florida; Mishmash *v.* ... 821
Florida; Morningstar *v.* ... 865,1013
Florida; Muhammad *v.* ... 914
Florida; Pirolli *v.* ... 865
Florida; Porter *v.* ... 996
Florida; Roberts *v.* ... 1070
Florida; Russell *v.* ... 1038
Florida; Spaziano *v.* ... 1010
Florida; Stanley *v.* ... 998
Florida; Tijerina *v.* ... 977
Florida; Waterhouse *v.* ... 1073
Florida Dept. of Health and Rehabilitative Services; Nourse *v.* ... 823
Florida *ex rel.* Smith; Brummer *v.* ... 1007
Florida National Guard; Federal Labor Relations Authority *v.* ... 940
Florida Parole and Probation Comm'n; Adams *v.* ... 1066
Florida Patient's Comp. Fund; Southeast Volusia Hospital Dist. *v.* ... 1066

Page
Florida Tile Co. *v.* National Labor Relations Bd. 817
Flota Mercante Grancolumbiana, S.A.; Rodriguez *v.* 820
Floyd *v.* Allen 897
Fluellen *v.* Jago 843
Flygare *v.* Washington 854
Fobes *v.* Superior Court of Cal., Los Angeles County 853
Fogg; Tamilio *v.* 1041
Fogle *v.* Supreme Court of S. C. 982
Foltz; Johnson *v.* 942
Fomage *v.* United States 890
Fontana *v.* Barham 1043
Fools Crow *v.* Gullet 977
Forbes *v.* American Telephone & Telegraph 1020
Forbes *v.* Municipal Court of Los Angeles Judicial Dist. 844
Forbes *v.* Waddington 837
Ford *v.* Israel 832
Ford *v.* Strickland 865
Fordham *v.* National Bank of Boyertown 1050
Ford Motor Co.; Quality Ford, Inc. *v.* 826
Foremost Pro Color, Inc. *v.* Eastman Kodak Co. 811
Formaldehyde Institute, Inc. *v.* Frechette 936
Forsyth *v.* United States 1001,1074
Fort Lauderdale *v.* Farmer 816
Fortner; Coxwell *v.* 855
Fortner *v.* Nebraska 816
Foss America, Inc.; Western Food Equipment Co. *v.* 825,1003
Foster *v.* Florida 1052
Foster; Maryland *v.* 1073
Fowler *v.* Alabama 918
Fox; Carnicle *v.* 847
Fox; Daily Income Fund, Inc. *v.* 523
Fox *v.* United States 1069
Fox Ridge Associates & Co. *v.* Board of Assessors of Marshfield 801
Frame *v.* South Bend Community School Corp. 815
Franchetti; Shell Petroleum N. V. *v.* 1012
Franchise Tax Bd.; Container Corp. of America *v.* 909
Franchise Tax Bd. of Cal.; Alcan Aluminum Ltd. *v.* 1041
Franchise Tax Bd. of Cal. *v.* U. S. Postal Service 1037
Franey *v.* United States 853
Frank *v.* Davis 847
Frankel *v.* United States 898
Franklin *v.* Kroger Co. 831
Franklin *v.* United States 845
Franklin Computer Corp. *v.* Apple Computer, Inc. 1033

Page

Franklin Mint Corp. *v.* Trans World Airlines, Inc. 809,889
Franklin Mint Corp.; Trans World Airlines, Inc. *v.* 809,889
Frans *v.* United States 828
Frazen; Madyun *v.* 996
Frazier *v.* Manson 934
Frechette; Formaldehyde Institute, Inc. *v.* 936
Free *v.* Illinois 865,1004
Freed *v.* United States 839
Freedman; Mangalick Enterprises, Inc. *v.* 939
Freeman, *In re* 806,990
Freeman; Donnell *v.* 941,1027
Freitas; Bacchus Imports, Ltd. *v.* 1015
Fresh Pond Shopping Center, Inc. *v.* Callahan 875
Frey *v.* Anderson 1057
Frezzo Brothers, Inc. *v.* United States 829
Friedman *v.* Ohio Dept. of Health 835
Frost *v.* United States 964
Fuentes *v.* Michigan 1009
Fugate; Letendre *v.* 837
Fullmer *v.* Utah 910
Fulton *v.* Plumbers 913
Fundacion Educativa Ana G. Mendez *v.* Suarez 879
Fung; Gee *v.* 849,978
Fusaro *v.* United States 1007
Gable *v.* Sames 894
Gaddy *v.* New York 963
Gadomski *v.* United States Steel Corp. 1003
Gaertner *v.* United States 1071
GAF Corp.; Pitts *v.* 1003
Gagnon; Lampkins *v.* 1050
Gagnon; Massachusetts *v.* 815
Gaines *v.* Merchants National Bank & Trust Co. 1013
Galanty *v.* Chrysler Corp. 826
Galardo *v.* AMP Inc. 915
Gallop *v.* United States 942
Galvan *v.* United States 914
Gambale *v.* United States 1071
Gambles *v.* United States 1049
Gamez-Rubio *v.* United States 843
Ganci *v.* Scully 836
Gandy; Bishop *v.* 860
Ganey *v.* Safron 811
Gann, Inc. *v.* Commissioner 821
Gant *v.* Texas 836,1048

Page
Garbin *v.* Florida 933
Garcia *v.* San Antonio Metropolitan Transit Authority 812,989,1035
Garcia *v.* United States 840
Gardner *v.* Pan American World Airways, Inc. 933
Garrison; Harding *v.* 834
Garrison; Harren *v.* 942
Garrison; Hutchins *v.* 1065
Gary Aircraft Corp. *v.* United States 820
Garza; Texas *v.* 863
Gaston *v.* United States 854,1004
Gaunce *v.* DeVincentis 978
Gee *v.* Fung 849,978
Geiger *v.* Lehman 860
Gelb, *In re* 957
Gelb *v.* United States 853
General Dynamics Corp.; Laventhall *v.* 846
General Electric Co.; Puerto Rico Electric Power Authority *v.* 937
General Electric Co.; S.S. Nancy Lykes *v.* 849
General Electric Credit Corp.; Montgomery Mall Ltd. Ptshp. *v.* 830
General Motors Acceptance Corp.; Birchfield *v.* 999
General Motors Corp.; Bond *v.* 817
General Motors Corp.; Kizzier Chevrolet Co. *v.* 847
General Motors Corp.; Massarsky *v.* 937
General Motors Corp.; McKenzie *v.* 938
General Motors Corp.; Olson Motor Co. *v.* 894
General Motors Corp.; Ruzicka *v.* 982
Gentsch *v.* Clark 1051
Gentsch *v.* Lowe 1019
Geophysical Service, Inc.; Presley *v.* 1038
George *v.* Government of Virgin Islands 832
Georgia; Cole *v.* 959
Georgia; Conner *v.* 865,1005
Georgia; Crowe *v.* 1068
Georgia; Harbin *v.* 843
Georgia; Lang *v.* 937
Georgia; Ledesma *v.* 1069
Georgia; McCann *v.* 1044
Georgia; Mincey *v.* 977,1064
Georgia; Waller *v.* 959
Georgia; Wilson *v.* 865,1004
Georgia; Young *v.* 1057
Georgia Bd. of Naturopathic Examiners *v.* Bowers 894
Getto; Commonwealth Edison Co. *v.* 815
Getty Refining & Marketing Co.; Kocian *v.* 852

	Page
Giardino; Wainwright *v.*	965
Gibbons *v.* National Steel Service Center, Inc.	814
Gibson, *In re*	811
Gibson *v.* South Carolina	913
Gibson *v.* Utah	894
Giddings & Lewis Machine Tool Co. *v.* Pollak	864
Gigliotti, *In re*	958
Gil *v.* United States	834
Gill, *In re*	990,1074
Gilliard *v.* Mississippi	867
Gilmore; Chevron Chemical Co. *v.*	814
Gilmore *v.* Missouri	1306
Ginsburg *v.* United States	1044
Giuliani *v.* Chuck	803
Givens *v.* Castillo	850
Gladstone; Davis *v.*	1052
Glaser *v.* Salorio	993
Glaser; Salorio *v.*	993
Glasschroeder, *In re*	911
Glassey *v.* United States	1032
Gleason *v.* United States	925
G & L Investments, Inc.; Igoe *v.*	1019
Globe Democrat Publishing Co.; Brown *v.*	928
Glover *v.* Alexander	990,1071
Glover; Tower *v.*	813
Goddard *v.* Missouri	997
Godek *v.* United States	1047
Godoy *v.* United States	959
Godwin *v.* United States	1052
Gold; Mann *v.*	932
Goldberg *v.* Woodcrest Nursing Home	849
Goldburn, *In re*	980
Goldfarb, *In re*	911
Goldman's Egg City *v.* United States	814
Goldstein, *In re*	926
Gomez-Bethke *v.* United States Jaycees	1037
Gomez-Diaz *v.* United States	1051
Gonsalves; United States *v.*	806
Gonzales *v.* New Mexico	855
Gonzalez *v.* California	1033
Gonzalez *v.* Commission on Judicial Performance of Cal.	1033
Goode; Wainwright *v.*	78
Goodman *v.* Heckler	839
Goodman *v.* United States	1001

Page
Goodpasture, Inc.; M/V POLLUX *v.* 909
Goodridge *v.* United States 985
Goodwin; Briggs *v.* 1040
Gordon, *In re* 807
Gordon; Alabama *v.* 820
Gordon *v.* Estelle 858
Gould *v.* Control Laser Corp. 935
Gouveia; United States *v.* 913,1035
Government National Mortgage Assn.; Behrend *v.* 914
Government of Virgin Islands; Blyden *v.* 832
Government of Virgin Islands; El-Amin *v.* 831,987
Government of Virgin Islands; George *v.* 832
Government of Virgin Islands; Leycock *v.* 917
Government of Virgin Islands; Smith *v.* 831,987
Governor of Alaska; Carpenter *v.* 801
Governor of Cal.; H. J. Justin & Sons, Inc. *v.* 823
Governor of Cal.; Justin Boot Co. *v.* 823
Governor of Haw. *v.* Pekarsky 1052
Governor of Ill.; Hoskins *v.* 964
Governor of N. Y.; New York Assn. for Retarded Children, Inc. *v.* 915
Grace *v.* Western Contracting Corp. 828
Gragg; Florida *v.* 820
Graham; Church of Christ of Collinsville *v.* 821
Graham *v.* East Orange 1051
Graham *v.* Houseman 940
Graham; Mackey *v.* 894
Graham *v.* New York 896,1005
Granat; Keasler *v.* 1018
Grant *v.* Erie Ins. Exchange 938
Grattan; Burnett *v.* 981
Graves *v.* Stockley 999
Gravier *v.* United States 996
Gray & Co.; Oregon-Wash. Carpenters-Employers Pension Tr. *v.* 912
Gray & Co.; Pension Benefit Guaranty Corporation *v.* 912
Greathouse *v.* Marshall 1011
Green, *In re* 959
Green; Amerada Hess Corp. *v.* 1039
Green *v.* California 1046
Green; Clarksdale Baptist Church *v.* 807
Green *v.* Green 823
Green *v.* Louisiana 984
Green *v.* Oklahoma 962
Green; Wachter *v.* 941
Green Bay & Western R. Co.; Eliasen *v.* 874

Page
Greene *v.* Massey 1046
Greene *v.* Whirlpool Corp. 1042
Greenman *v.* United States 992
Greenmoss Builders, Inc.; Dun & Bradstreet, Inc. *v.* 959
Greenwood; McDonough Power Equipment, Inc. *v.* 548,927
Greer; Dominique *v.* 836
Greer *v.* Parisie 950
Greer; Parisie *v.* 918
Greer *v.* United States 918
Gregory *v.* Iowa 833
Grenada Bank *v.* Willey 849
Griffen; Big Spring Independent School Dist. *v.* 1008
Griffin; Wright *v.* 831
Griffith, *In re* 1006
Griggs *v.* United States 1068
Grimm *v.* Rizk 1045
Groce *v.* Washington Dept. of Corrections 942
Grolier Inc. *v.* Federal Trade Comm'n 891
Grossman, *In re* 926
Grove City College *v.* Bell 808,1005
Gryder's Estate *v.* Commissioner 1008
Guard *v.* Kilburn 893
Guest Quarters; Holland *v.* 858,978
Guigno *v.* Heckler 984
Guion *v.* United States 941
Guippone *v.* United States 992
Gukeisen *v.* United States 934
Gulf Coast Mental Health Center; Ordway *v.* 1067
Gulf Oil Corp. *v.* Federal Energy Regulatory Comm'n 1038
Gullet; Fools Crow *v.* 977
Gullett *v.* United States 1069
Gunter *v.* Kentucky 1018
Gurn; Veenkant *v.* 851,1004
Gustine *v.* Gustine 1044
Gutierrez *v.* United States 940
Guy; Campbell *v.* 1051
Guy *v.* Tip Top, Faberge, Inc. 964
Guy *v.* U. S. Postal Service 835
Guyton *v.* Ricketts 897
Hachler *v.* United States 998
Hackford *v.* First Security Bank of Utah 827
Hageman *v.* Home Ins. Co. 983
Hagerstown Kitchens, Inc. *v.* Board of Comm'rs of Wash. County 847
Haggins *v.* Warden, Fort Pillow State Farm 1071

Page
Hagler *v.* United States 917
Haider *v.* McDonnell Douglas Corp. 866
Haimowitz *v.* United States 1069
Hale *v.* Ohio 837
Hall *v.* Alabama 859
Hall; Arkla, Inc. *v.* 822
Hall *v.* Cuyler 836
Hall *v.* Iowa 934
Hall *v.* Maryland 1050
Hall *v.* New Jersey 1008
Hall *v.* United States 1002
Hallstrom, *In re* 812
Halsell *v.* Bricklayers 895
Hamb *v.* Illinois 840
Hamid *v.* United States 1046
Hammerhead Enterprises, Inc. *v.* Brezenoff 892
Hammond; Carpenter *v.* 801
Hampton *v.* United States 831,964,1011
Handley; Jackson *v.* 825
Hannan *v.* Secretary of Army 833,978
Hansen *v.* United States 1042
Haralson County; Dollar *v.* 963
Harbin *v.* Georgia 843
Harden *v.* E. I. du Pont de Nemours & Co. 937
Hardesty; Armco Inc. *v.* 1016
Hardin *v.* Kentucky 896
Hardin *v.* United States 918
Harding *v.* Garrison 834
Hardrich *v.* United States 991
Harger *v.* Oklahoma 837
Harlaux *v.* Harlaux 816
Harmsen; Shannon *v.* 822
Harmsen; Smith *v.* 822
Harper & Row, Publishers, Inc.; Fleury *v.* 846
Harren *v.* Garrison 942
Harris *v.* Fenn 1044
Harris *v.* Hayes 896
Harris *v.* Kastama 844
Harris *v.* Laster 855
Harris *v.* Mississippi 1049
Harris *v.* Norfolk 1009
Harris *v.* Quinlan 831
Harris *v.* United States 898,997
Harris *v.* Virginia 1011

Page
Harris County Hospital Dist.; Schwanecke *v.* 846
Harris Enterprises, Inc.; Copenhaver *v.* 846
Harrisville; Clooney *v.* 909
Harry L. Laws Co.; Chitimacha Tribe *v.* 814
Harshman *v.* Petrolite Corp. 839
Hartford *v.* Arizona 842,978
Harthun, *In re* 957
Hartke *v.* McKelway 983
Hartz Mountain Associates; Siller *v.* 961
Harvey *v.* Anderson 840
Harvey *v.* Pincus 918
Harvier; California *v.* 820
Hasbro Industries, Inc. *v.* A/S Garonne-Glittre 1013
Hatch *v.* Reliance Ins. Co. 1069
Hatteras, Inc. *v.* United States 815
Hawaiian Airlines, Inc. *v.* Director of Taxation of Haw. 7
Hawaiian Independent Refinery, Inc. *v.* United States 816
Hawaii Housing Authority *v.* Midkiff 932
Hawkins *v.* Jno. McCall Coal Export Corp. 995
Hawkins *v.* United States 840,1052
Hawthorne *v.* United States 1070
Hayes *v.* Arkansas 865
Hayes *v.* Baton Rouge 983
Hayes; Harris *v.* 896
Hayes Oilfield Construction Co. *v.* U. S. Fidelity & Guaranty Co. 818
Hayfield Northern R. Co. *v.* Chicago & N. W. Transp. Co. 812,1015
Haynes *v.* California 1009
Haynes *v.* United States 999
Headley; Christenson *v.* 835
Health Care Plan of New Jersey, Inc. *v.* Heckler 815
Healy *v.* Maggio 984
Healy *v.* United States Brewers Assn., Inc. 909
Hearne; Tokar *v.* 844
Heat & Frost Insulators *v.* Young 981
Heck *v.* Heck 850
Heckel; Curtis *v.* 834
Heckler; Attwell *v.* 941,1064
Heckler; Baltsavias *v.* 1050
Heckler; Campbell *v.* 1049
Heckler *v.* Community Health Services of Crawford County, Inc. 812,980
Heckler; Crouch *v.* 898
Heckler; Fleshman *v.* 1049
Heckler; Goodman *v.* 839
Heckler; Guigno *v.* 984

	Page
Heckler; Health Care Plan of New Jersey, Inc. *v.*	815
Heckler; Iredell Memorial Hospital, Inc. *v.*	846
Heckler; Iron Arrow Honor Society *v.*	67
Heckler; Johnson *v.*	839
Heckler; Johnson County Memorial Hospital *v.*	816
Heckler; Jones *v.*	1039
Heckler *v.* Lopez	879
Heckler; Neal *v.*	1000
Heckler; Ondrusek *v.*	998
Heckler; Orenstein *v.*	964
Heckler; St. James Hospital *v.*	830
Heckler; Shope *v.*	991
Hedley *v.* Trans World Airlines, Inc.	847
Hedrick; Thompson *v.*	916
Heeringa; Smith *v.*	1045
Heflin *v.* Kentucky State Racing Comm'n	806
Heimbach *v.* New York	956
Heise *v.* United States	918
Helmich *v.* United States	939
Helton *v.* United States	857
Henderson *v.* Arkansas	1012
Henderson; Cauley *v.*	897
Henderson; Paul *v.*	835
Henderson *v.* Silverstein	864
Henry *v.* Arkansas	835
Henry; Johnson *v.*	1011
Henry *v.* Ohio	917
Henry S. Branscome, Inc. *v.* United States	806,1008
Hensley *v.* United States	1000
Herald Co.; Brown *v.*	928
Herbert *v.* United States	821
Hernandez *v.* Estelle	844
Hernandez *v.* United States	918
Herring *v.* Florida	1018
Herrmann *v.* United States	992
Herships *v.* MacClaren	1000
Herzfeld *v.* U. S. District Court	815
Hess *v.* South Carolina	827,995
Hester; McMillan *v.*	1010
Hiam; American Family Life Assurance Co. *v.*	850
Hick *v.* Apex Marine Corp.	830
Hicks *v.* United States	842
Higgs *v.* Kentucky	941
Higgs; Shedd *v.*	997

	Page
Hill *v.* Mississippi	977
Hill *v.* United States	1039
Hill *v.* Zimmerman	940
Hiller *v.* Alaska	1008
Hillie *v.* Maggio	1051
Hillyard *v.* United States	964
Hines *v.* United States	972,1064
Hirschfeld *v.* Dreyer	816
Hishon *v.* King & Spalding	959
Hiss, *In re*	890
H. J. Justin & Sons, Inc. *v.* Deukmejian	823
H. M. Trimble & Sons, Ltd. *v.* Kingsley & Keith (Canada) Ltd.	982
Hobby *v.* United States	1017
Hobson *v.* U. S. Parole Comm'n	862
Hochanadel *v.* Detco Trailer, Inc.	822
Hodges *v.* Board of Comm'rs on Grievances and Discipline	960
Hoff, *In re*	926
Hoffman *v.* South Carolina	821
Hoffman *v.* United States	861
Holcomb *v.* California	840,1004
Holden *v.* United States	862
Holder *v.* Stephenson	897
Holguin *v.* Raines	896
Holland *v.* Guest Quarters	858,978
Holleman *v.* Duckworth	834
Holliman *v.* United States	964
Hollingsworth, *In re*	911
Holloway *v.* Estelle	891
Holloway *v.* Valley	914
Holmes *v.* King	984
Holter *v.* Moore & Co.	937
Holton *v.* Benford	830
Holway *v.* Thornton	850
Home Ins. Co.; Hageman *v.*	983
Hooven & Allison Co.; Limbach *v.*	813,990
Hoover *v.* Lee	854
Hoover *v.* Ronwin	810,980,989,1014
Hope Homes, Inc.; Beres *v.*	937
Hopi Indian Tribe *v.* Block	1056
Hopkins *v.* United States	963
Hopkinson *v.* Wyoming	908
Hopper; Adkins *v.*	834
Hopper; Brown *v.*	1000
Horton *v.* United States	997

Page

Hoskins *v.* Thompson 964

Hospital Building Co. *v.* Trustees of Rex Hospital 904,1003

Hospital Building Co.; Trustees of Rex Hospital *v.* 890

Hospital Employees *v.* Assad 806

Hotel Employees; Brown *v.* 990

Hotel Employees; Danziger *v.* 990

Houseman; Graham *v.* 940

Houston; LaFalce *v.* 1044

Hovsepian *v.* Neff 824

Howard *v.* Paxson 833

Howard *v.* Taylor 839

Howard *v.* United States 934

Howard Co.; Columbia *v.* 893

Howard Univ.; Richards *v.* 1043

Howell *v.* Appling 1072

Huang *v.* Bernstein 837

Hubbard; Johnson *v.* 917

Huber, *In re* 910

Hudenburg *v.* Neff 937

Hudnall; Sellner *v.* 1046

Hudson *v.* Brierton 833

Hughes *v.* Neff 824

Hughes Tool Co.; Smith International, Inc. *v.* 996

Hull *v.* United States 1039

Human Services Dept.; Jojola *v.* 803

Humpherey *v.* United States 863

Humphrey *v.* Shreveport 849

Humphreys (Cayman), Ltd. *v.* Lehman 1042

Hunter; Runte *v.* 858

Hunter *v.* United States 854

Huntington County Comm'rs; Oliver *v.* 963

Huntington Park Redevelopment Agency; Duncan *v.* 895

Hurley *v.* Albuquerque Title Co. 1044

Hustler Magazine, Inc.; Keeton *v.* 958

Hutchins *v.* Garrison 1065

Hutchins; Woodard *v.* 377

Hutchinson Crane Excavating Co.; Westbrook *v.* 994

Hutter; Kaushiva *v.* 820

Hutto; Webb *v.* 1034

Hyde; Jefferson Parish Hospital Dist. No. 2 *v.* 808

Hyde *v.* Mississippi 961

Hydroculture, Inc. *v.* Coopers & Lybrand 986

Hyosung America, Inc.; Moon *v.* 921

Iacono Structural Engineer, Inc.; Construction Laborers *v.* 851

	Page
I. A. M. National Pension Fund *v.* Elser	813
Iavarone *v.* United States	1039
Idaho *v.* Bradley	1041
Idaho *ex rel.* Moon *v.* State Bd. of Examiners	992
Igoe *v.* Jones	1019
Illinois; April *v.*	917
Illinois; Atencia *v.*	917
Illinois; Beil *v.*	824
Illinois; Dampier *v.*	940
Illinois; Davis *v.*	1001,1074
Illinois; Deavers *v.*	832
Illinois; Dodson *v.*	840
Illinois; Dunlap *v.*	802
Illinois; Free *v.*	865,1004
Illinois; Hamb *v.*	840
Illinois; Jones *v.*	920
Illinois; Kubat *v.*	865
Illinois; McKibbins *v.*	844
Illinois; McNair *v.*	860
Illinois; Newsome *v.*	934
Illinois; Teague *v.*	867
Illinois; Vanda *v.*	841
Illinois; V. J. S. *v.*	837,1004
Illinois; Zboinski *v.*	917
Illsley *v.* United States	839
Illsley *v.* U. S. Parole Comm'n	1001
Immigration and Naturalization Service *v.* Lopez-Mendoza	1037
Immigration and Naturalization Service *v.* Phinpathya	183
INA Underwriters Ins. Co.; Demyan's Hofbrau, Inc. *v.*	820
Independence Tube Corp.; Copperweld Corp. *v.*	809
Indiana; Baxter *v.*	1008
Indiana; Partlow *v.*	1072
Indiana; Schiro *v.*	1003
Indiana Bell Telephone Co.; Ernst *v.*	1041
Indiana Univ. Foundation *v.* Reed	978
Industrial Investment Development Corp.; Mitsui & Co. *v.*	961
Infant Doe *v.* Bloomington Hospital	961
Ingersoll Rand Co.; Conti *v.*	1049
Inglis *v.* Feinerman	1040
Ingraham *v.* Maine	860
Ingraham *v.* McCarthy	840,1018
Ingram *v.* Alabama	1049
Ingram; Electrical Workers *v.*	937
Inland Division of General Motors Corp.; Lamore *v.*	963,1064

Page

In re. See name of party.
Inryco, Inc.; Metropolitan Erecting Co. *v.* 937
Insilco Corp.; Interlox Punch & Die Corp. *v.* 817
Interlox Punch & Die Corp. *v.* Insilco Corp. 817
Internal Revenue Service; Crooker *v.* 857
International. For labor union, see name of trade.
International Business Machines Corp.; Transamerica Computer *v.* 955
International Harvester Co.; Thompson *v.* 1043
International Mining Exchange, Inc.; Eken *v.* 815
International Mooring & Marine, Inc. *v.* Bertrand 1069
International Society for Krishna Consciousness *v.* Marsland 805
International Studio Apartment Assn. *v.* Lockwood 895
International Telephone & Telegraph Corp.; Norris Industries *v.* 818
Interstate Commerce Comm'n; Field Container Corp. *v.* 1039
Interstate Commerce Comm'n; Nicholson *v.* 1056
Interstate North Associates; Officenters Int'l Corp. of Atlanta *v.* 937
Iowa; Gregory *v.* 833
Iowa; Hall *v.* 934
Iowa; Mulville *v.* 844
Iowa; Puerto Rico *v.* 1034
Iowa; Schmidt *v.* 824
Iowans for Tax Relief *v.* Campaign Finance Disclosure Comm'n 879
Iredell Memorial Hospital, Inc. *v.* Heckler 846
Iron Arrow Honor Society *v.* Heckler 67
Irving Independent School Dist. *v.* Tatro 1007
Isaacs *v.* United States 852
Israel; Ford *v.* 832
Israel; Neely *v.* 1048
Isringhausen; Simpson *v.* 1072
Italiano, *In re* 926,1066
ITT World Communications, Inc.; FCC *v.* 932
Ivey *v.* Fisher 893
Ivy *v.* Natchitoches Parish School Bd. 916
Ivy *v.* Texas 933
Jabara *v.* Webster 863
Jackson, *In re* 1037
Jackson; Ashley *v.* 900,1003
Jackson *v.* Butterworth 916,1027
Jackson *v.* Handley 825
Jackson *v.* Maryland 836
Jacobs; Zerman *v.* 859,963
Jacques *v.* United States 923
Jago; Fluellen *v.* 843
Jago; Jones *v.* 914

Page
Jago; Wilford *v.* 891
Jamardo *v.* United States 914
James *v.* Clark 1016
James *v.* Kentucky 913
James; Langford *v.* 1040
James *v.* Louisiana 908,1005
James *v.* Martin 839
Jameson *v.* Bethlehem Steel Corp. 994
Jameson *v.* United States 942
Janasz; Payne *v.* 1019
Jarrell; Eisenbeiss *v.* 820
Jay *v.* United States 861
Jay Edwards, Inc.; New England Toyota Distributor, Inc. *v.* 894
JBL Enterprises, Inc. *v.* Jhirmack Enterprises, Inc. 829
J. C. Penney Co.; Affeldt *v.* 955
J. C. Penney Co.; Wambheim *v.* 1036
Jeffers *v.* Arizona 865
Jefferson Parish; Brister *v.* 822
Jefferson Parish Hospital Dist. No. 2 *v.* Hyde 808
Jenkins *v.* Jenkins 848
Jenks *v.* United States 964
Jensen *v.* United States 960
Jernigan *v.* Texas 986
Jerry T. O'Brien, Inc.; Securities and Exchange Comm'n *v.* 1038
Jhirmack Enterprises, Inc.; JBL Enterprises, Inc. *v.* 829
J. H. Rutter Rex Mfg. Co. *v.* United States 1008
Jiles *v.* United States 843
Jimena *v.* Board of Review of Utah Industrial Comm'n 845
Jno. McCall Coal Export Corp.; Hawkins *v.* 995
John *v.* Wilkinson 985
Johnson *v.* Arkansas 851
Johnson *v.* District School Bd. of Hernando County 851,1004
Johnson; Ferguson *v.* 960
Johnson *v.* Florida 1048
Johnson *v.* Foltz 942
Johnson *v.* Heckler 839
Johnson *v.* Henry 1011
Johnson *v.* Hubbard 917
Johnson; Knight *v.* 832
Johnson *v.* Louisiana 855
Johnson; Mabry *v.* 1017
Johnson *v.* Norman 899
Johnson *v.* Parks 838
Johnson *v.* Perez 825

Page
Johnson; Robinson *v.* 836
Johnson *v.* Tennessee Dept. of Employment Security 1019
Johnson *v.* United States 840,895,942,1010,1047
Johnson; University College of Univ. of Ala. *v.* 994
Johnson *v.* Wainwright 1011
Johnson; Washington Metropolitan Area Transit Authority *v.* 1068
Johnson *v.* Zimmerman 899
Johnson Brothers Wholesale Liquor Co.; Clemmons *v.* 936
Johnson County Memorial Hospital *v.* Heckler 816
Joiner *v.* Vasquez 981
Jojola *v.* New Mexico *ex rel.* Human Services Dept. 803
Joliet; Ostrowski *v.* 879
Jones, *In re* 911
Jones *v.* Florida 891
Jones *v.* Heckler 1039
Jones; Igoe *v.* 1019
Jones *v.* Illinois 920
Jones *v.* Jago 914
Jones *v.* Mississippi River Grain Elevator Co. 856
Jones; National Enquirer, Inc. *v.* 810
Jones *v.* North Carolina 995
Jones *v.* Superior Court of Cal., Orange County 998
Jones *v.* United States 842,859,985,986
Jorgenson Co. *v.* Seattle 982
Joseph Gann, Inc. *v.* Commissioner 821
Joyner *v.* Mofford 1002
Judge, Circuit Court of Montgomery; Alabama *v.* 820
Judge, 14th Jud. Dist. of Okla.; Church of Christ of Collinsville *v.* 821
Judge, Lee County General District Court; Letendre *v.* 837
Judge, U. S. Tax Court; Robinson *v.* 840
Julian *v.* United States 831
Julius Goldman's Egg City *v.* United States 814
Justices of Mass.; Siano *v.* 819
Justin Boot Co. *v.* Deukmejian 823
Justin & Sons, Inc. *v.* Deukmejian 823
Kahala Community Assn., Inc. *v.* Midkiff 932
Kahl *v.* McDonnell Douglas Corp. 866
Kajevic *v.* United States 1047
Kaly *v.* Michigan 1039
Kam Choo *v.* Esso Oil Co. 826
Kan *v.* Landon 1039
Kansas; Aldrich *v.* 819
Kansas; Roby *v.* 985
Kansas Cartage *v.* Mo-Kan Teamsters Pension Fund 1045

Page
Kansas City Southern R. Co. *v.* Faulkenberry 850
Kaplan *v.* Office of U. S. Attorney for Dist. of N. J. 839,987
Kapocsi *v.* Oklahoma 1070
Kappas *v.* Chestnut Lodge, Inc. 852
Kapper *v.* Ohio 856
Karapinka *v.* Union Carbide Corp. 892,1004
Karo; United States *v.* 1068
Kaske; Rockford *v.* 960
Kastama; Harris *v.* 844
Katsougrakis *v.* United States 1040
Kaushiva *v.* Hutter 820
Kazanzas *v.* Walt Disney World Co. 982
Kazubowski; Pepper *v.* 854
Keasler *v.* Granat 1018
Keefe *v.* Massachusetts 1034
Keenan *v.* Wainwright 891
Keene Corp. *v.* United States 864
Keeton *v.* Hustler Magazine, Inc. 958
Keller; Clark Equipment Co. *v.* 1044
Kelly; Faulkner *v.* 843
Kelly; Lindsey *v.* 916
Kelly *v.* United States 908,916,1047
Kemp; Amadeo *v.* 956,1064
Kemp; Dick *v.* 986,1064
Kemp *v.* Equal Employment Opportunity Comm'n 1048
Kemp *v.* Smith 807
Kemp; Smith *v.* 1003,1032
Kemp; Stephens *v.* 1027
Kemp *v.* United States 1048
Kendricks *v.* Mount Sinai Hospital Medical Center of Chicago 999
Kent *v.* New York City Dept. of Sanitation 941
Kentron Hawaii, Ltd.; Budde *v.* 828
Kentucky; Duncan *v.* 998
Kentucky; Gunter *v.* 1018
Kentucky; Hardin *v.* 896
Kentucky; Higgs *v.* 941
Kentucky; James *v.* 913
Kentucky; Lewallen *v.* 982
Kentucky; Little *v.* 895
Kentucky; Neace *v.* 860
Kentucky State Racing Comm'n; Heflin *v.* 806
Kerns *v.* United States 981
Kerr-McGee Corp.; Silkwood *v.* 238
Ketchikan Pulp Co. *v.* Reid Brothers Logging Co. 916

Page
Khourie; Moore *v.* 803
Kilburn; Guard *v.* 893
Killough *v.* Alabama 1008
Kimberly-Clark Corp.; Sack *v.* 1045
Kimble *v.* United States 1073
Kincaid *v.* Eberle 1018
King; Holmes *v.* 984
King *v.* McEvers 1011
King *v.* United States 837,839,845
King; Vinzant *v.* 965
King; Williams *v.* 1027
Kingsley & Keith (Canada) Ltd.; H. M. Trimble & Sons, Ltd. *v.* 982
King & Spalding; Hishon *v.* 959
Kinnell *v.* Stephan 854
Kinner *v.* Morris 960
Kirby Forest Industries, Inc. *v.* United States 913
Kirk; Long *v.* 1000
Kirk *v.* United States 962
Kirkham; Larsen *v.* 849
Kirks *v.* Kirks 1009
Kirksey *v.* Mississippi 801
Kish *v.* Benedek 999
Kizas *v.* United States 1042
Kizzier Chevrolet Co. *v.* General Motors Corp. 847
Klamath-Lake Pharmaceutical Assn. *v.* Klamath Medical Serv. Bur. 822
Klamath Medical Serv. Bur.; Klamath-Lake Pharmaceutical Assn. *v.* 822
Klayer *v.* United States 858
Kleinman *v.* United States 983
Knapp *v.* Arizona 988
Knapp *v.* Wisconsin 834
Knight *v.* Johnson 832
Knight; Minnesota Bd. for Community Colleges *v.* 889
Knight; Minnesota Community College Faculty Assn. *v.* 889
Knighten *v.* Commissioner 897
Knights *v.* Wolff 1000
Koch; Metropolitan Package Store Assn., Inc. *v.* 802,1003
Kocian *v.* Getty Refining & Marketing Co. 852
Kodadek *v.* United States 918
Koehler *v.* Engle 890
Koehler; Patterson *v.* 1046
Koenig *v.* South Dakota 940
Koker *v.* Betts 803,1003
Kondrat *v.* Schaefer 819
Koob; Mann *v.* 1037

Page
Koppers Co.; P Stone, Inc. *v.* 879,1013
Kotos; Larson *v.* 962
Kourakos *v.* Tully 1070
Kozachenko *v.* United States 962
Kozloff, Inc. *v.* Wells Fargo Business Credit 818
Krall *v.* Bethel Park School Dist. 851
Kramarsky; Polk *v.* 1000
Kramer *v.* United States 962
Krause; Filipas *v.* 999
Krebs *v.* Krebs 890
Kroger Co.; Franklin *v.* 831
Kubat *v.* Illinois 865
Kubiak *v.* United States 852
Kuellmar *v.* Brookfield Village 823
KVUE–TV, Inc.; Texas *v.* 1006
Laber, *In re* 988
Laborers *v.* Abreen Corp. 1040
Labor Union. See name of trade.
Lac Courte Oreilles Band; Besadny *v.* 805
Laclede Gas Co. *v.* Office of Public Counsel of Mo. 819
Lacour *v.* West 837
Ladd; Multistate Legal Studies, Inc. *v.* 814
Ladner; Williams *v.* 850
LaFalce *v.* Houston 1044
Lagnas *v.* United States 862
Laguna Beach; Brownfield *v.* 894,1004
Laing *v.* United States 853,896
La Jolla Band of Mission Indians; Escondido Mut. Water Co. *v.* 913,1067
Lake Erie Alliance for Prot. of Coastal Corr. *v.* Corps of Engineers 915
Lakewood; Lakewood Congregation of Jehovah's Witnesses, Inc. *v.* 815
Lakewood Congregation of Jehovah's Witnesses, Inc. *v.* Lakewood 815
Lam *v.* United States 942
LaMaina *v.* United States 895
Lamar; Steele *v.* 821
Lambertis *v.* Virgin Islands 1046
Lamore *v.* Inland Division of General Motors Corp. 963,1064
Lampkin *v.* North American Finance Co. 828,1003
Lampkins *v.* Gagnon 1050
Landes *v.* United States 856
Landmark Financial Corp. of Georgia; McCurdy *v.* 984
Landon; Kan *v.* 1039
Landy *v.* Federal Aviation Administration 895
Lane; Feliciano *v.* 1010
Lane; Meares-El *v.* 964

Page
Laney *v.* Tennessee 1003
Lang *v.* Georgia 937
Langford *v.* James 1040
Lanigan *v.* United States 814
Laredo Junior College *v.* Perez 1042
LaRette *v.* Missouri 908,1004
Larsen *v.* Fisher 959
Larsen; Fisher *v.* 959
Larsen *v.* Kirkham 849
Larsen *v.* Sielaff 956
Larson *v.* Kotos 962
Lask *v.* United States 829
Laski *v.* Laski 843
Laster; Harris *v.* 855
Latchis *v.* Commissioner 833
Latif *v.* United States 942
Latin Belly, Ltd. *v.* United States 825
Latner *v.* United States 914
Lau Tung Lam *v.* United States 942
Laventhall *v.* General Dynamics Corp. 846
Lawrence County *v.* Lead-Deadwood School Dist. No. 40–1 1006
Laws *v.* Missouri 1306
Laws Co.; Chitimacha Tribe *v.* 814
Lawson Milk Co.; Taylor *v.* 848
Leach *v.* U. S. Postal Service 814
Lead-Deadwood School Dist. No. 40–1; Lawrence County *v.* 1006
Leaseway Transportation Corp. *v.* United States 960
Leatherby Ins. Co. *v.* Merit Ins. Co. 1009
Lebovitz *v.* United States 992,1064
Ledesma *v.* Georgia 1069
Lee *v.* Department of Personnel of New York City 835
Lee; Hoover *v.* 854
Lee *v.* Monsen 1039
Lee *v.* National Can Corp. 845
Lee; Newtop *v.* 845
Lee *v.* United States 839
Lee; Wagman *v.* 849
LeGrand *v.* Marshall 1047
Lehman; Boyd *v.* 1043
Lehman; Geiger *v.* 860
Lehman; Humphreys (Cayman), Ltd. *v.* 1042
Lehman; Swain *v.* 814
Lehman; Wimmer *v.* 992
Leibowitz, *In re* 807

Page
LeMaire *v.* United States 1012
Lenard; Argento *v.* 815
Lennen; Burlington Northern R. Co. *v.* 1067
Leon; United States *v.* 889,1015
Leonard *v.* Zimmerman 857
Leonard B. Hebert, Jr. & Co. *v.* National Labor Relations Bd. 817
Leone *v.* Cosmopolitan Shipping Co. 895
LeResche; South-Central Timber Development, Inc. *v.* 890,1034
Lesiak *v.* Ferguson 826,1064
Lester *v.* United States 996
Letendre *v.* Fugate 837
Letnes *v.* U. S. District Court 992
Levasseur *v.* Virginia 1063
Leventhal *v.* Reiser 845
Levine *v.* Silsdorf 831
Levy *v.* Department of Rehabilitative Services of Va. 854
Levy *v.* Virginia 855
Lewallen *v.* Kentucky 982
Lewellen *v.* Commissioner 803
Lewis *v.* Brown & Root, Inc. 1069
Lewis *v.* Davis 843
Lewis *v.* United States 857,987,1020
Lewis-Westco Co.; Alcoholic Beverage Control Appeals Bd. *v.* 863
Lewy *v.* Weinberger 818
Leycock *v.* Government of Virgin Islands 917
Licensed Beverage Distributors Assn. *v.* United States 933
Lilley *v.* New York 1051
Limbach *v.* Boothe Financial Corp. 1057
Limbach *v.* Hooven & Allison Co. 813,990
Lincoln; Board of Regents of Univ. System of Ga. *v.* 826
Linden *v.* New York 804
Lindsey *v.* Kelly 916
Lindsey *v.* Louisiana 908,1004
Linfield *v.* Board of Higher Ed. of New York City 928,1045
Lionti *v.* Lloyd's Ins. Co. 995
Lipscomb *v.* United States 853,857
Litt *v.* United States 940
Little *v.* Kentucky 895
Littleton *v.* Wolff 837
Litton Systems, Inc.; American Telephone & Telegraph Co. *v.* 811,1073
Livesay; Sammons *v.* 964
Ljubas *v.* United States 917
Lloyd's Ins. Co.; Lionti *v.* 995
Local. For labor union, see name of trade.

Page
Locke; Rudolph *v.* 835
Lockhart *v.* Dyas 982
Lockhart; Smith *v.* 832
Lockhart; Wallace *v.* 934
Locks *v.* Sumner 933
Lockwood; International Studio Apartment Assn. *v.* 895
Loe *v.* United States 991
Logan *v.* Supreme Court of Iowa 910
Logarusic *v.* United States 840
London Gold Exchange; Tucker *v.* 897,987
London Steamship Mut. Ins. Assn., Ltd.; M. W. Zack Metal Co. *v.* 894
Lone Steer, Inc.; Donovan *v.* 408
Long, *In re* 910
Long *v.* Kirk 1000
Long *v.* Rison 1051
Long *v.* United States 839
Longe *v.* New York 1043
Lopera-Ochoa *v.* United States 852
Lopez; Heckler *v.* 879
Lopez *v.* New Mexico 831
Lopez *v.* United States 861,935
Lopez-Mendoza; Immigration and Naturalization Service *v.* 1037
Lorenzetti; United States *v.* 1068
Lorenzo, *In re* 926
Los Angeles; Brennan *v.* 821
Los Angeles County; Ashworth *v.* 1011
Los Angeles County *v.* Equal Employment Opportunity Comm'n . 1073
Los Angeles Dept. of Water and Power *v.* National Audubon Society 977
LOT Polish Airlines *v.* Robles 845,978
Louisiana; Conger *v.* 1050
Louisiana; Coody *v.* 846
Louisiana; Green *v.* 984
Louisiana; James *v.* 908,1005
Louisiana; Johnson *v.* 855
Louisiana; Lindsey *v.* 908,1004
Louisiana *v.* Mississippi 888
Louisiana; Moore *v.* 986
Louisiana; Narcisse *v.* 865,957,1004
Louisiana; Oliver *v.* 997
Louisiana; Pittman *v.* 836
Louisiana; Spaulding *v.* 851
Louisiana; United States *v.* 927
Love *v.* Oklahoma 843
Loveday *v.* Federal Communications Comm'n 1008

Page
Lowe; Gentsch *v.* 1019
Lowe & Gordon, Ltd.; Byrum *v.* 961
Lowenthal, *In re* 988
Lower Brule Sioux Tribe; South Dakota *v.* 1042
Lowry *v.* Baltimore & Ohio R. Co. 893
Lozano *v.* United States 858
LTV Federal Credit Union *v.* UMIC Government Securities, Inc. 852
Lubavitch Chabad House of Illinois, Inc.; Evanston *v.* 992
Lubbers; Smith *v.* 996
Lucas; McFadden *v.* 998
Lucas; Smith *v.* 899
Luera *v.* Estelle 834
Luigi Marre Land & Cattle Co. *v.* Pacific Gas & Electric Co. 828
Lui Su Nai-Chao *v.* Boeing Co. 1017
Lutheran Hospital Society of Southern California; Brown *v.* 856,987
Lybrand; McCain *v.* 808
Lymon *v.* United States 839
Lynchburg; Maniates *v.* 879
Mabry *v.* Johnson 1017
MacClaren; Herships *v.* 1000
MacDonald *v.* Ferguson Reorganized School Dist. R–2 961
Machinists; Utility Trailer Sales Co. *v.* 1005
Mackey *v.* Graham 894
Mackinac Island; Arnold Transit Co. *v.* 804,1064
Madera *v.* California 997
Madyun *v.* Frazen 996
Maggio; Dorsey *v.* 832
Maggio; Dugar *v.* 985
Maggio; Healy *v.* 984
Maggio; Hillie *v.* 1051
Maggio; Mingo *v.* 984
Maggio; Price *v.* 861
Maggio; Serio *v.* 999
Maggio; Smith *v.* 831
Maggio; Spotville *v.* 841
Maggio; Strong *v.* 1071
Maggio; Thomas *v.* 1051
Maggio; Tyler *v.* 857
Maggio; Walker *v.* 842
Maggio *v.* Williams 46
Maghielse Tool & Die Co.; Morvay *v.* 1011
Magill *v.* Florida 865
Maguire, Voorhis & Wells, P. A.; Platel *v.* 1036
Maiden; Schwartz *v.* 984

Page
Maine; Ingraham *v.* 860
Maintenance Contractors, Inc. *v.* Pierce 993
Maiorano *v.* United States 849
Malachowski *v.* Silverberg, Marvin & Swaim, P. C. 850
Malandris; Merrill Lynch, Pierce, Fenner & Smith Inc. *v.* 824
Mallette Bros. Construction Co. *v.* United States 935
Mallory *v.* Alabama 1047
Malloy *v.* United States 899
Mally *v.* Shimer 1072
Malumphy *v.* Arizona Bd. of Pardons and Parole 1072
Mancuso *v.* New York City 993
Mandel, *In re* 926
Mandell, *In re* 958
Mangalick Enterprises, Inc. *v.* Freedman 939
Maniates *v.* Lynchburg 879
Manis *v.* Chief Judge, Circuit Court of Greene County 1048
Mann *v.* Canter 932
Mann *v.* Gold 932
Mann *v.* Koob 1037
Mansaw *v.* United States 986
Manson; Frazier *v.* 934
Marathon Pipeline Co.; Rowan Cos. *v.* 820
Maratty *v.* Sowders 837
Marcello *v.* United States 935
Margolis *v.* United States 1047
Maritime Int'l Nominees Establishment *v.* Republic of Guinea 815
Maritime Overseas Corp.; Thezan *v.* 1050
Markey; Costa *v.* 1017
Marks *v.* U. S. Postal Service 1011
Marquez *v.* Texas 802
Marquez *v.* United States 856
Marriott In-Flite Services *v.* National Labor Relations Bd. 829
Marsh *v.* Oakland 824
Marshall; Bell *v.* 997
Marshall; Brown *v.* 835
Marshall; Chapin *v.* 1047
Marshall; Everitt *v.* 894
Marshall; Greathouse *v.* 1011
Marshall; LeGrand *v.* 1047
Marshall; McMinn *v.* 842
Marshall; Noggle *v.* 1010
Marshall *v.* Oklahoma 942
Marshall; Robbins *v.* 940
Marshall; Thompkins *v.* 853

	Page
Marshall *v.* United States	1010
Marshall; Van Almen *v.*	899
Marshall *v.* Walker	951
Marshall; Walker *v.*	962
Marshfield; Marshfield Family Skateland, Inc. *v.*	987
Marshfield Family Skateland, Inc. *v.* Marshfield	987
Marsland; International Society for Krishna Consciousness *v.*	805
Marston; Clark *v.*	874,987
Martel *v.* New Hampshire	1050
Martin *v.* California	899
Martin; James *v.*	839
Martin *v.* Meachum	859
Martin *v.* Mitchell	915
Martinez *v.* Winans	837
Martino; Santa Clara Valley Water Dist. *v.*	847
Martorano *v.* United States	993
Marx *v.* Centran Corp.	995
Maryland *v.* Foster	1073
Maryland; Hall *v.*	1050
Maryland; Jackson *v.*	836
Maryland; Meyer *v.*	994
Maryland; Randall Book Corp. *v.*	919,1013
Maryland; Rose *v.*	1072
Maryland; Sumrall *v.*	1050
Maryland; Sydnor *v.*	1048
Maryland; Wilson *v.*	1049
Maryland-National Capital Park and Planning Comm'n; Solyom *v.*	801
Maschi *v.* United States	840
Mashpee Tribe *v.* Clark	1020
Mashpee Tribe *v.* New Seabury Corp.	866
Masinexportimport; S & S Machinery Co. *v.*	850
Mason *v.* Mississippi	960
Massachusetts; Appleby *v.*	941
Massachusetts; Benson *v.*	915
Massachusetts; Billups *v.*	898
Massachusetts; Burke Distributing Co. *v.*	957
Massachusetts; B & W Transportation *v.*	957
Massachusetts; Cinelli *v.*	860
Massachusetts *v.* Gagnon	815
Massachusetts; Keefe *v.*	1034
Massachusetts *v.* Sheppard	888,1034
Massachusetts; Spinney *v.*	834
Massarsky *v.* General Motors Corp.	937
Massey; Greene *v.*	1046

Page
Master Printers Assn. *v.* Donovan 1040
Mata; Sumner *v.* 957
Matteson *v.* Oregon State Penitentiary 832
Matthews *v.* United States 861
Mauldin; Upjohn Co. *v.* 848
Maunalua Beach *v.* Midkiff 932
Maxcy *v.* United States 898,917
May; Avedisian *v.* 909,1013
Mayes *v.* Sowders 985
Mayor of Chicago; Oziemkiewicz *v.* 1044
Mayor of New York City; Metropolitan Package Store Assn. *v.* 802,1003
Mazzola *v.* Donovan 1040
McAdoo *v.* Federal Bureau of Investigation 941
McCaffrey; Poppos *v.* 859
McCain *v.* Lybrand 808
McCall Coal Export Corp.; Hawkins *v.* 995
McCann *v.* Georgia 1044
McCarren *v.* Springfield 942
McCarthy *v.* Charles D. Bonanno Linen Service, Inc. 936
McCarthy; Coleman *v.* 832
McCarthy; Ingraham *v.* 840,1018
McCarthy *v.* McCarthy 837
McCarthy; South Street Seaport Museum *v.* 1067
McCarty; Berkemer *v.* 1038
McClain *v.* Orr 875
McClandon; DeVRY Inc. *v.* 936
McClinnahan *v.* United States 867
McClure; Oliver *v.* 1069
McClure *v.* Texas 841
McComb, *In re* 957
McCord *v.* United States 862
McCrae *v.* United States 1001
McCranie *v.* United States 992
McCrary; Alabama *v.* 913
McCrary *v.* New York 1049
McCrary-El *v.* Wyrick 843
McCurdy *v.* Landmark Financial Corp. of Georgia 984
McDaniel *v.* Texas 891
McDaniel *v.* United States 1012
McDonald, *In re* 811
McDonald *v.* Missouri 1306
McDonald *v.* West Branch 813
McDonnell Douglas Corp.; Haider *v.* 866
McDonnell Douglas Corp.; Kahl *v.* 866

Page
McDonnell Douglas Corp. *v.* Northrop Corp. 849
McDonough Power Equipment, Inc. *v.* Greenwood 548,927
McDougall *v.* North Carolina 865
McEntire & Co.; Eastern Foods, Inc. *v.* 849
McEvers; King *v.* 1011
McFadden *v.* Lucas 998
McFadden; Sanchez *v.* 961
McGhee, *In re* 926
McGrath, *In re* 807
McGreer; Rajneesh *v.* 1065
MCI Communications Corp. *v.* American Tel. & Tel. Co. 891
MCI Communications Corp.; American Tel. & Tel. Co. *v.* 891
McIlwain *v.* United States 972
McKaskle; Baker *v.* 1048
McKaskle; Beadle *v.* 1019
McKaskle; Bruce *v.* 963
McKaskle; Davis *v.* 999,1010
McKaskle; Roberson *v.* 1049
McKaskle; Sloan *v.* 1048
McKaskle *v.* Tarpley 1002
McKaskle *v.* Vela 1053
McKaskle; Whittington *v.* 983
McKay *v.* Rockwell International Corp. 1043
McKeen; Blanck *v.* 916
McKelway; Hartke *v.* 983
McKenzie; Davis *v.* 855
McKenzie *v.* General Motors Corp. 938
McKibbins *v.* Illinois 844
McKinon *v.* Wainwright 896
McKnight *v.* United States 1052
McLaughlin *v.* United States 842
McLean, *In re* 910
McMahon *v.* United States 1001
McManigal; United States *v.* 979
McMannis *v.* Mohn 831
McMillan; Escambia County *v.* 830,980,1014
McMillan *v.* Hester 1010
McMinn *v.* Marshall 842
McMonagle; Berger *v.* 1017
McMurray, *In re* 911
McMurtrey *v.* Arizona 858
McNair *v.* Illinois 860
McQueen *v.* Barber 861
McQueen *v.* Dixon 1049

Page
Meachum *v.* Battle 1006
Meachum; Martin *v.* 859
Meador *v.* Ohio 841
Meadows *v.* Redman 1034
Meadows *v.* United States 850
Meares-El *v.* Lane 964
Medina-Reyes *v.* United States 1011
Meeker *v.* United States 826
Mehta, *In re* 807
Members of Jamestown School Committee *v.* Schmidt 851
Memphis Fire Dept. *v.* Stotts 808
Mendoza; United States *v.* 154
Menichino *v.* United States 858
Menkes *v.* New York City 858
Meraz *v.* United States 1045
Merchants National Bank & Trust Co.; Gaines *v.* 1013
Merena *v.* Sato 817
Merit Ins. Co.; Leatherby Ins. Co. *v.* 1009
Merit Ins. Co.; Western Employers Ins. Co. *v.* 1009
Merrill Lynch, Pierce, Fenner & Smith Inc. *v.* Malandris 824
Merritt; Faulkner *v.* 986
Mers *v.* United States 991
Mertsching *v.* United States 829
Mesirow *v.* Pepperidge Farm, Inc. 820
Mesquite *v.* Aladdin's Castle, Inc. 927
Messner *v.* United States 818
Mestre *v.* Pitney Bowes, Inc. 893
Metal Recycling Co. *v.* Donovan 849,1004
Metropolitan Atlanta Rapid Transit Authority; Attwell *v.* 897,1005
Metropolitan Erecting Co. *v.* Inryco, Inc. 937
Metropolitan Package Store Assn., Inc. *v.* Koch 802,1003
Metropolitan Transit Authority; Archer *v.* 802
Metz *v.* Tootsie Roll Industries, Inc. 1070
Meyer *v.* Maryland 994
Meyers; Moody *v.* 920
MGPC, Inc.; Canadian Hidrogas Resources, Ltd. *v.* 961
Mianecki *v.* Second Judicial District Court of Nev. 806
Michael Construction Co. *v.* EEOC 1038
Michael Reese Hospital; Raja *v.* 846
Michelin Tire Corp. *v.* Bostick Oil Co. 894
Michigan *v.* Clifford 287
Michigan; Crane *v.* 804
Michigan; Fuentes *v.* 1009
Michigan; Kaly *v.* 1039

Page
Michigan Canners & Freezers Assn. *v.* Agric. Mktg. Bd. ... 912,989,1006
Michigan Dept. of Corrections; Moore *v.* ... 998
Michigan Dept. of Social Services; Finney *v.* ... 923,1064
Midkiff; Hawaii Housing Authority *v.* ... 932
Midkiff; Kahala Community Assn., Inc. *v.* ... 932
Midkiff; Maunalua Beach *v.* ... 932
Midkiff; Portlock Community Assn. *v.* ... 932
Midlam; Angel *v.* ... 802
Midway Mfg. Co.; Artic International, Inc. *v.* ... 823
Miles *v.* N. Y. Teamsters Conf. Employee Pension Benefit Plan ... 829
Miller *v.* California ... 843
Miller *v.* Oklahoma ... 834
Miller; Panter *v.* ... 845,978
Miller *v.* Pierce ... 928
Miller *v.* Union State Bank ... 1019
Miller *v.* United States ... 935,939,1073
Mills *v.* Monroe County ... 1018
Mills *v.* United States ... 1069
Mincey *v.* Georgia ... 977,1064
Minch *v.* Fargo ... 829
Mine Workers *v.* Consolidation Coal Co. ... 993
Mingo *v.* Maggio ... 984
Minick *v.* United States ... 831
Minnesota Bd. for Community Colleges *v.* Knight ... 889
Minnesota Community College Faculty Assn. *v.* Knight ... 889
Minnesota Public Interest Research Gp.; Selective Service System *v.* 1006
Mintzes; Brady *v.* ... 897
Mintzes; Daniels *v.* ... 983
Mintzes; Palmer *v.* ... 834
Minye *v.* University of Mich. ... 899,1005
Mishmash *v.* Florida ... 1071
Mission *v.* United States ... 1041
Mississippi; Gilliard *v.* ... 867
Mississippi; Harris *v.* ... 1049
Mississippi; Hill *v.* ... 977
Mississippi; Hyde *v.* ... 961
Mississippi; Kirksey *v.* ... 801
Mississippi; Louisiana *v.* ... 888
Mississippi; Mason *v.* ... 960
Mississippi; Pruett *v.* ... 865
Mississippi; Rippetoe *v.* ... 983
Mississippi; West *v.* ... 963
Mississippi Power Co. *v.* Mississippi Public Service Comm'n ... 819
Mississippi Public Service Comm'n; Mississippi Power Co. *v.* ... 819

Page
Mississippi River Grain Elevator Co.; Jones *v.* 856
Mississippi State Employment Service; Pegues *v.* 991
Missouri; Battle *v.* 1306
Missouri; Davis *v.* 962
Missouri; Dixon *v.* 1072
Missouri; Gilmore *v.* 1306
Missouri; Goddard *v.* 997
Missouri; LaRette *v.* 908,1004
Missouri; Laws *v.* 1306
Missouri; McDonald *v.* 1306
Missouri; Molasky *v.* 1049
Missouri; Salkil *v.* 1010
Missouri; Smith *v.* 908
Mitchell; Martin *v.* 915
Mitchell *v.* Nocera 1011
Mitchell *v.* Texas 1073
Mitlo *v.* United States 1018
Mitsui & Co. *v.* Industrial Investment Development Corp. 961
Mobile Home Estates, Inc. *v.* National Labor Relations Bd. 1039
Mofford; Joyner *v.* 1002
Mohn; McMannis *v.* 831
Mo-Kan Teamsters Pension Fund; Creason *v.* 1045
Mo-Kan Teamsters Pension Fund; Kansas Cartage *v.* 1045
Molasky *v.* Missouri 1049
Mollen; Yalkowsky *v.* 939
Mollohan *v.* West Virginia 832
Monroe County; Mills *v.* 1018
Monsanto Co.; Ruckelshaus *v.* 890
Monsen; Lee *v.* 1039
Montana *v.* Northern Cheyenne Tribe 874
Montana Dakota Utilities Co.; Van Emmerik *v.* 915
Montemayor *v.* United States 822
Montemuro; Winpenny *v.* 1001
Montgomery Mall Ltd. Partnership *v.* General Electric Credit Corp. 830
Moody *v.* Meyers 920
Moon *v.* Hyosung America, Inc. 921
Moon *v.* State Bd. of Examiners 992
Moore, *In re* 979,990
Moore *v.* Khourie 803
Moore *v.* Louisiana 986
Moore *v.* Michigan Dept. of Corrections 998
Moore; Roberts *v.* 853
Moore *v.* United States 859,862,899,964,997
Moore & Co.; Holter *v.* 937

Page
Moorman; Thompson *v.* 982
Morales; Cardosa *v.* 819
Morales *v.* New York Univ. 818
Moran; Ferola *v.* 839
Morder; Owens *v.* 1000
Morejon-Ortega *v.* United States 855
Moreno *v.* California 984
Moretti *v.* Multi-Pak Corp. 988
Morgado; Personnel Bd. of Jefferson County *v.* 1045
Morgan *v.* Zimmerman 985
Morgenthau; Erlbaum *v.* 993
Morningstar *v.* Florida 821
Morris; Carlsen *v.* 854
Morris; Kinner *v.* 960
Morris; Smith *v.* 984
Morris; Weathersby *v.* 1046
Morrison; Washington County Hospital Assn., Inc. *v.* 864
Morrison-Knudsen Co.; Teal *v.* 824
Morrow *v.* United States 1069
Morse/Diesel, Inc.; Rouse SI Shopping Center, Inc. *v.* 936
Morton Grove; Quilici *v.* 863
Morton Grove; Reichert *v.* 863
Morton Grove; Stengl *v.* 863
Morvay *v.* Maghielse Tool & Die Co. 1011
Moschiano *v.* United States 831
Mosley *v.* Smith 984
Motlagh *v.* United States 996
Mottola *v.* New York 836
Mount Sinai Hospital Medical Center of Chicago; Kendricks *v.* 999
Moushey, *In re* 1066
Movible Offshore, Inc. *v.* Olsen 1045
Moya *v.* United States 979
Muhammad *v.* Florida 865,1013
Muhammad *v.* United States 842,899
Mullen; Beausang *v.* 827
Mullen *v.* Starr 978
Mulligan *v.* Arizona 860,1005
Multi-Pak Corp.; Moretti *v.* 988
Multistate Legal Studies, Inc. *v.* Ladd 814
Mulville *v.* Iowa 844
Municipal Court of Los Angeles Judicial Dist.; Forbes *v.* 844
Murcia *v.* United States 899
Murph *v.* United States 844
M/V POLLUX *v.* Goodpasture, Inc. 909

Page
M. W. Zack Metal Co. *v.* London Steamship Mut. Ins. Assn., Ltd. 894
Myers *v.* Spalding 859
Myers *v.* United States 998
Nagel, *In re* 1014
Nai-Chao *v.* Boeing Co. 1017
Nakagawa, *In re* 811
Narcisse *v.* Louisiana 865,957,1004
Nardone *v.* United States 997
Natchitoches Parish School Bd.; Ivy *v.* 916
Nathanson *v.* United States 939
Nation *v.* United States 856
National Audubon Society; Los Angeles Dept. of Water & Power *v.* 977
National Bank of Boyertown; Fordham *v.* 1050
National Can Corp.; Lee *v.* 845
National Cash Register Corp. *v.* Rose 939
National Collegiate Athletic Assn. *v.* Bd. of Regents of U. of Okla. 913
National Enquirer, Inc. *v.* Jones 810
National Enquirer, Inc. *v.* Superior Court of Cal., Los Angeles Cty. 810
National Foundation for Cancer Res. *v.* Council of Better Bus. Burs. 830
National Labor Relations Bd.; Al Bryant, Inc. *v.* 1039
National Labor Relations Bd.; Arizona Public Service Co. *v.* 1043
National Labor Relations Bd.; Behring International, Inc. *v.* 1071
National Labor Relations Bd. *v.* Bildisco & Bildisco 912
National Labor Relations Bd.; DMR Corp. *v.* 852
National Labor Relations Bd.; Electrical Workers *v.* 950
National Labor Relations Bd.; Florida Tile Co. *v.* 817
National Labor Relations Bd.; Leonard B. Hebert, Jr. & Co. *v.* 817
National Labor Relations Bd.; Marriott In-Flite Services *v.* 829
National Labor Relations Bd.; Mobile Home Estates, Inc. *v.* 1039
National Labor Relations Bd.; New York Racing Assn., Inc. *v.* 914
National Labor Relations Bd. *v.* New York Univ. Medical Center. 805
National Labor Relations Bd.; Penntech Papers, Inc. *v.* 892
National Labor Relations Bd.; Presto Casting Co. *v.* 994
National Labor Relations Bd.; Schaefer *v.* 945,1064
National Labor Relations Bd.; S. E. Nichols of Ohio, Inc. *v.* 914
National Labor Relations Bd.; Sure-Tan, Inc. *v.* 808,889,912
National Labor Relations Bd.; Teamsters *v.* 827,912
National Labor Relations Bd. *v.* United Parcel Service, Inc. 979
National Labor Relations Bd.; United Parcel Service, Inc. *v.* 960
National Labor Relations Bd.; Woodkraft Division, Ga. Kraft Co. *v.* 981
National Society for Children & Adults with Autism; Aldrich *v.* 1049
National Steel Service Center, Inc.; Gibbons *v.* 814
Nations *v.* Sun Oil Co. (Delaware) 893
Natural Resources Defense Council, Inc.; Am. Iron & Steel Inst. *v.* 927

Page
Natural Resources Defense Council, Inc.; Chevron U.S.A. Inc. *v.* 927
Natural Resources Defense Council, Inc.; Ruckelshaus *v.* 810,927
Navajo Indian Tribe; Babbitt Ford, Inc. *v.* 1006
Navajo Medicinemen's Assn. *v.* Block 1056
Navajo Tribe; Arizona *v.* 874
Neace *v.* Kentucky 860
Neal *v.* Alabama 1019
Neal *v.* Heckler 1000
Neale; Yalkowsky *v.* 916
Nebraska; Fortner *v.* 816
Nebraska; Rife *v.* 1070
Nebraska; Spradlin *v.* 1011
Nedeczky *v.* Ohio 824
Neely *v.* Israel 1048
Neff; Hovsepian *v.* 824
Neff; Hudenburg *v.* 937
Neff; Hughes *v.* 824
Neil *v.* United States 859
Nell *v.* Dunham 836
Nelson; Edmond *v.* 1066
Nelson; Thompson *v.* 829
Nelson *v.* Tuscarora Intermediate Unit No. 11 866
Nelson House *v.* Tuscarora Intermediate Unit No. 11 866
Nembhard *v.* United States 823
Nerison *v.* Solem 1072
Nesglo, Inc. *v.* Chase Manhattan Bank 935
Nestle Co.; Struthers Patent Corp. *v.* 915
Nevada *v.* United States 875
Nevada *v.* Vine 977
Nevin *v.* United States 815
New England Toyota Distributor, Inc. *v.* Jay Edwards, Inc. 894
New Hampshire; Allard *v.* 933
New Hampshire; Martel *v.* 1050
New Jersey; Bartley *v.* 842
New Jersey; Flemmings *v.* 918
New Jersey; Hall *v.* 1008
New Jersey; Tango *v.* 849
New Jersey *v.* T. L. O. 991
Newman *v.* United States 853,863,1007
New Mexico; Aaron *v.* 858
New Mexico; Colorado *v.* 927
New Mexico; Cortez *v.* 964
New Mexico; Edgington *v.* 940
New Mexico; Gonzales *v.* 855

Page
New Mexico; Lopez *v.* 831
New Mexico; Robinson *v.* 851
New Mexico *ex rel.* Human Services Dept.; Jojola *v.* 803
New Mexico *ex rel.* "One Minute of Silence" Statute *v.* Burciaga 982
New Seabury Corp.; Mashpee Tribe *v.* 866
Newsome *v.* Illinois 934
Newtop *v.* Lee 845
New York; Alston *v.* 855
New York; Arango *v.* 833
New York; Cserenyi *v.* 985
New York; Evans *v.* 1018
New York; Felix *v.* 802
New York; Gaddy *v.* 963
New York; Graham *v.* 896,1005
New York; Heimbach *v.* 956
New York; Lilley *v.* 1051
New York; Linden *v.* 804
New York; Longe *v.* 1043
New York; McCrary *v.* 1049
New York; Mottola *v.* 836
New York; O'Connell *v.* 841
New York *v.* Quarles 809
New York; Santiago *v.* 817
New York; Stinson *v.* 1010
New York *v.* Uplinger 812,1015,1035
New York Assn. for Retarded Children, Inc. *v.* Carey 915
New York City; Barry *v.* 1017
New York City; Mancuso *v.* 993
New York City; Menkes *v.* 858
New York City; Slevin *v.* 1017
New York City Bd. of Estimate; Washington *v.* 1013
New York City Criminal Court Judge *v.* Morgenthau 993
New York City Dept. of Sanitation; Kent *v.* 941
New York Commissioner of Correctional Services; Washington *v.* 1045
New York Dept. of Taxation & Finance *v.* Air Transport Assn. 960
New York Foundling Hospital; Siroonian *v.* 941
New York Human Rights Appeal Bd.; Engle *v.* 841,1004
New York Human Rights Appeal Bd.; Trans World Airlines *v.* 811,1065
New York Life Ins. Co.; Wright *v.* 862,978
New York Racing Assn., Inc. *v.* National Labor Relations Bd. 914
New York State Dept. of Public Service *v.* United States 1013
New York Teamsters Conf. Employee Pension Benefit Plan; Miles *v.* 829
New York Univ.; Morales *v.* 818
New York Univ. Medical Center; National Labor Relations Bd. *v.* 805

Page

Nibungco *v.* United States 823
Nichols of Ohio, Inc. *v.* National Labor Relations Bd. 914
Nicholson *v.* Interstate Commerce Comm'n 1056
Nickol *v.* Zimmerman 874
Nifong *v.* United States 979,996
Nigro; Powell *v.* 846
Nix; Rousseau *v.* 890
Nix *v.* Williams 810
Noble *v.* United States 807
Nocera; Mitchell *v.* 1011
Noe *v.* Texas 997,1064
Noggle *v.* Marshall 1010
Norfolk; Harris *v.* 1009
Norfolk Redev. & Housing Auth. *v.* Chesapeake & Potomac Tel. Co. 30
Norman; Johnson *v.* 899
Norman *v.* United States 820
Norris; Ariz. Governing Comm. for Annuity & Comp. Plans *v.* 808
Norris Industries *v.* International Telephone & Telegraph Corp. . 818
North American Finance Co.; Lampkin *v.* 828,1003
North Carolina; Craig *v.* 908
North Carolina; Jones *v.* 995
North Carolina; McDougall *v.* 865
North Carolina; Sandlin *v.* 995
North Carolina; Smith *v.* 918
North Carolina; Williams *v.* 865,1004
North Dakota; Ennis *v.* 992
Northern Cheyenne Tribe; Montana *v.* 874
Northern Plains Resource Council; EPA *v.* 806
Northrop Corp.; McDonnell Douglas Corp. *v.* 849
Nourse *v.* Florida Dept. of Health and Rehabilitative Services ... 1073
Novack *v.* Wisconsin 867
Nuclear Regulatory Comm'n; Alabama Power Co. *v.* 816
Nuclear Regulatory Comm'n; Rockland County *v.* 993
Nunez; Colorado *v.* 812,989
Nunley *v.* Oklahoma 867
Nuth; Powell *v.* 985
O.; New Jersey *v.* 991
Oakie *v.* United States 855
Oakland; Marsh *v.* 824
Oakland Raiders *v.* Berkeley 939
O'Brien; Trapnell *v.* 838
O'Brien *v.* United States 1051
O'Brien *v.* Wilcox & Schlosser 819
O'Brien, Inc.; Securities and Exchange Comm'n *v.* 1038

Page
Occidental Petroleum Corp.; Clayco Petroleum Corp. *v.* 1040
Oceanic Contractors, Inc. *v.* Cormier 821
Ocean Sands Holding Corp. *v.* Commissioner 827
Ochs *v.* United States 1073
O'Connell *v.* New York 841
O'Connor *v.* Organ & Co. 851
O'Dillon *v.* Zant 834
Odom *v.* United States 1000,1010
Officenters International Corp. of Atlanta *v.* Interstate North Assoc. 937
Office of Personnel Management; Valenzuela *v.* 856
Office of Public Counsel of Mo.; Laclede Gas Co. *v.* 819
Office of U. S. Attorney for Dist. of N. J.; Kaplan *v.* 839,987
Ogden Corp.; Buffalo Forge Co. *v.* 1018
Ogrod *v.* School Dist. of Philadelphia 804
Ogrod *v.* Tomlinson Court Apartments 803
Ogrod *v.* Weiss 804
Ohio; Chase Foundry & Mfg. Co. *v.* 823
Ohio; Childress *v.* 853
Ohio; Dowdy *v.* 840
Ohio; Duerr *v.* 816
Ohio; Hale *v.* 837
Ohio; Henry *v.* 917
Ohio; Kapper *v.* 856
Ohio; Meador *v.* 841
Ohio; Nedeczky *v.* 824
Ohio; Pearson *v.* 910
Ohio; Williams *v.* 1020
Ohio Dept. of Health; Friedman *v.* 835
Ohio Dept. of Liquor Control; Scioto Trails Co. *v.* 1034
Ohio-Sealy Mattress Mfg. Co. *v.* Sealy, Inc. 1002,1044
O'Kelley *v.* United States 838
Oklahoma; Coleman *v.* 1073
Oklahoma; Daniels *v.* 844
Oklahoma; Davis *v.* 865,933
Oklahoma; Dodd *v.* 857
Oklahoma; Fleming *v.* 859
Oklahoma; Green *v.* 962
Oklahoma; Harger *v.* 837
Oklahoma; Kapocsi *v.* 1070
Oklahoma; Love *v.* 843
Oklahoma; Marshall *v.* 942
Oklahoma; Miller *v.* 834
Oklahoma; Nunley *v.* 867
Oklahoma; Reed *v.* 933

Page
Oklahoma; Smith *v.* 858,924
Oklahoma; Stahl *v.* 1069
Oklahoma; Thomas *v.* 842
Oklahoma; Williams *v.* 963
Oklahoma; Wood *v.* 855
Oliver *v.* Huntington County Comm'rs 963
Oliver *v.* Louisiana 997
Oliver *v.* McClure 1069
Olsen *v.* CBS Musical Instruments 892
Olsen; Movible Offshore, Inc. *v.* 1045
Olsen *v.* Progressive Music Supply, Inc. 866
Olsen; Shell Oil Co. *v.* 1045
Olson Motor Co. *v.* General Motors Corp. 894
Ondrusek *v.* Heckler 998
One Assortment of 89 Firearms; United States *v.* 889
131.68 Acres of Land *v.* United States 817
O'Neill *v.* United States 825
O'Neill; Vander Jagt *v.* 823
"One Minute of Silence" Statute *v.* Burciaga 982
One Parcel of Land *v.* Washington Metro. Area Transit Auth. 893
Ordway *v.* Gulf Coast Mental Health Center 1067
Ordway *v.* Region 13 Mental Health-Mental Retardation Comm'n. 1067
Oregon; Farber *v.* 987
Oregon; Waterhouse *v.* 853
Oregon State Penitentiary; Matteson *v.* 832
Oregon-Wash. Carpenters-Employers Pens. Tr. Fund *v.* Gray & Co. 912
Orenstein *v.* Heckler 964
Organ & Co.; O'Connor *v.* 851
Orofino *v.* United States 1020
Orr; McClain *v.* 875
Orzel; Wauwatosa Fire Dept. *v.* 992
Ostrer *v.* United States 862
Ostric *v.* Corporation of St. Mary's College, Notre Dame 936,1064
Ostrosky *v.* Alaska 1006
Ostrowski *v.* Joliet 879
Ouimet Corp. *v.* Pension Benefit Guaranty Corporation 961
Owens *v.* Barnes 963
Owens *v.* Morder 1000
Owens *v.* United States 1046
Owens *v.* Wainwright 834
Owens; Ward *v.* 1050
Owens-Illinois, Inc.; Ware *v.* 861
Oyster *v.* Oyster 801,978
Oziemkiewicz *v.* Washington 1044

Page
Pace *v.* Southern R. Co. 1018
Pacific Far East Lines, Inc.; Burton *v.* 852
Pacific Gas & Electric Co.; Luigi Marre Land & Cattle Co. *v.* 828
Padua *v.* United States 852
Palmer *v.* Mintzes 834
Palmer *v.* United States 817
Palmore *v.* Sidoti 913,1035
Palo Alto; Court House Plaza Co. *v.* 935
Pan American World Airways, Inc.; Coburn *v.* 994
Pan American World Airways, Inc.; Defex *v.* 826
Pan American World Airways, Inc.; Gardner *v.* 933
Pannucci; Billings *v.* 842
Panter *v.* Miller 845,978
Parez *v.* San Diego 897
Pari-Mutuel Clerks; Fair Grounds Corp. *v.* 846
Parish. See name of parish.
Parisie *v.* Greer 918
Parisie; Greer *v.* 950
Parke; Edwards *v.* 845
Parke; Whiteside *v.* 843
Parker; Brown *v.* 815
Parker *v.* Texas 997
Parker *v.* United States 836
Parks; Johnson *v.* 838
Parrott *v.* Wilson 936
Parsons, *In re* 910
Partlow *v.* Indiana 1072
Patel *v.* United States 899
Patterson; Byrum *v.* 961
Patterson *v.* Koehler 1046
Patton *v.* Yount 913,980
Paul *v.* Commissioner 1041
Paul *v.* Henderson 835
Paul *v.* United States 995
Paul E. Iacono Structural Engineer, Inc.; Construction Laborers *v.* 851
Paul N. Howard Co.; Columbia *v.* 893
Paulson *v.* Pierce County 957
Pavilonis, *In re* 811
Pawlak; Teamsters *v.* 1042
Pawlyshyn *v.* Smith 844
Paxson; Howard *v.* 833
Payne *v.* Janasz 1019
PB *v.* United States 828
Peach; Seltzer *v.* 860

Page
Peacock *v.* United States 965
Pearson *v.* Ohio 910
Pegues *v.* Mississippi State Employment Service 991
Pekarsky; Ariyoshi *v.* 1052
Pendleton *v.* United Parcel Service 817
Penney Co.; Affeldt *v.* 955
Penney Co.; Wambheim *v.* 1036
Pennsauken; Sweetman *v.* 1036
Pennsylvania; Breitegan *v.* 991
Pennsylvania; Davis *v.* 848
Pennsylvania; Falkenhan *v.* 803
Pennsylvania; Santiago *v.* 805
Pennsylvania; Simpson *v.* 822
Pennsylvania; Weaver *v.* 835
Pennsylvania Bd. of Probation and Parole; Piscanio *v.* 1020
Penntech Papers, Inc. *v.* National Labor Relations Bd. 892
Penobscot Nation *v.* Stilphen 923
Pension Benefit Guaranty Corporation; Ouimet Corp. *v.* 961
Pension Benefit Guaranty Corporation *v.* R. A. Gray & Co. 912
Pepper *v.* Kazubowski 854
Pepperidge Farm, Inc.; Mesirow *v.* 820
Pepsi-Cola Bottling Co.; Williams *v.* 898
Percharo, *In re* 959
Perez; Johnson *v.* 825
Perez; Laredo Junior College *v.* 1042
Perlow, *In re* 958
Perri, *In re* 926
Perry; Falkowski *v.* 819,1003
Persinger *v.* United States 940
Personnel Bd. of Jefferson County *v.* Morgado 1045
Peterson *v.* Chicago & Eastern Ill. R. Co. 1009
Peterson *v.* Virginia 865,1004
Petrella *v.* United States 921
Petrolite Corp.; Harshman *v.* 839
Pettee *v.* Purvis 862
Petti *v.* United States 933
Pettineo *v.* United States 982
Pettway; American Cast Iron Pipe Co. *v.* 809
Pfister *v.* American Airlines, Inc. 874,1004
Pharaon; First Arabian Corp., S.A. *v.* 892
Phifer *v.* United States 855
Philadelphia Lift Truck Corp. *v.* Taylor Machine Works, Inc. 84
Phillippi *v.* Bechtel Associates Professional Corp. 827
Phillips *v.* Alonzo 98

Page
Phillips; Egger *v.* 918
Phinpathya; Immigration and Naturalization Service *v.* 183
Piatkowska *v.* Vons Foodmarkets 856,1004
Pickands Mather & Co. *v.* Commissioner of Revenue of Minn. 1069
Pierce; Maintenance Contractors, Inc. *v.* 993
Pierce; Miller *v.* 928
Pierce; Portsmouth Redevelopment and Housing Authority *v.* 960
Pierce *v.* Volkswagen of America, Inc. 859
Pierce; Williams *v.* 1046
Pierce County; Paulson *v.* 957
Pifer *v.* United States 964
Pincus; Harvey *v.* 918
Pineda-Chinchilla *v.* United States 964
Pioneer Corp.; Superior Oil Co. *v.* 1041
Pipinos *v.* California 1072
Pirolli *v.* Florida 914
Piscanio *v.* Pennsylvania Bd. of Probation and Parole 1020
Pitney Bowes, Inc.; Mestre *v.* 893
Pittman *v.* Louisiana 836
Pitts *v.* GAF Corp. 1003
Pittsburg & Midway Coal Mining Co. *v.* Revenue Division 923
Pius XII Academy, Inc. *v.* Commissioner 982,1064
Plachter *v.* United States 829
Plain *v.* Baton Rouge 896
Platel *v.* Maguire, Voorhis & Wells, P. A. 1036
Platoro Ltd., Inc.; Texas *v.* 818
Platt *v.* United States 830
Plaza de las Armas, Inc. *v.* San Antonio 994
Plumbers; Fulton *v.* 913
Polk *v.* Kramarsky 1000
Pollak; Giddings & Lewis Machine Tool Co. *v.* 864
Polskie Linie Lotnicze *v.* Robles 845,978
Ponte; Burnette *v.* 941
Poppos *v.* McCaffrey 859
Porter *v.* Florida 865
Porter *v.* United States 828,1007
Portlock Community Assn. *v.* Midkiff 932
Portsmouth Redevelopment and Housing Authority *v.* Pierce 960
Posey *v.* Skyline Corp. 960
Posner; Randall *v.* 841
Posner; Tabone *v.* 848
Postmaster General; Woodside *v.* 822
Powell *v.* Nigro 846
Powell *v.* Nuth 985

Page
Powell *v.* U. S. Bureau of Prisons 832
Prasad *v.* Wassaic Developmental Center 834,1064
Pratt-Farnsworth, Inc. *v.* Carpenters 932
PRC Harris, Inc. *v.* Boeing Co. 936
Presiding Justice, App. Div., N. Y. Supreme Court; Yalkowsky *v.* 939
Presley *v.* Geophysical Service, Inc. 1038
Presley *v.* Wainwright 838
Press-Enterprise Co. *v.* Superior Court of Cal., Riverside County 501
Pressroom Unions-Printers League Fund *v.* Continental Assur. Co. 845
Presto Casting Co. *v.* National Labor Relations Bd. 994
Price *v.* Maggio 861
Price *v.* United States 1071
Pride *v.* United States 821
Pritikin; Roth *v.* 961
Privett *v.* United States 844
Proffitt *v.* Wainwright 1003
Proffitt; Wainwright *v.* 1002
Progressive Music Supply, Inc.; Olsen *v.* 866
Prosser's Moving & Storage Co. *v.* Robbins 813,1015
Provoda *v.* Belen Bd. of Ed. 916
Provoda *v.* Belen Consolidated Schools 916
Prudential Ins. Co. of America *v.* Bennett 1008
Prudential Ins. Co. of America; Stouffer Corp. *v.* 846,1004
Pruett *v.* Mississippi 865
Pruitt *v.* United States 1012
P Stone, Inc. *v.* Koppers Co. 879,1013
Public Utilities Comm'n of Cal.; Electrical Workers *v.* 1056
Public Utilities Comm'n of Ohio; Cleveland Elec. Illuminating Co. *v.* 802
Puerto Rico *v.* Iowa 1034
Puerto Rico Electric Power Authority *v.* General Electric Co. 937
Puerto Rico Highway Authority; Citadel Corp. *v.* 815
Purvis; Pettee *v.* 862
Putney *v.* Consolidated Rail Corp. 938
Pyramid Lake Paiute Tribe *v.* Truckee-Carson Irrigation Dist. 863,875
Quality Ford, Inc. *v.* Ford Motor Co. 826
Quality Packaging Supply Corp. *v.* Rochester 828
Quarles; New York *v.* 809
Quero *v.* United States 1000
Quick; Taylor *v.* 853
Quilici *v.* Morton Grove 863
Quinault Indian Nation; Snow *v.* 1036
Quinault Pacific Corp. *v.* Barclays American/Business Credit, Inc. 1042
Quinault Tribe; Snow *v.* 1036
Quinlan; Harris *v.* 831

Page
Quinn *v.* United States 1010
Quintana-Samaniego *v.* United States 1052
Quintanilla *v.* Scientific-Atlanta, Inc. 1069
Quintero; Colorado *v.* 810,1014
Radue *v.* United States 916
R. A. Gray & Co.; Ore.-Wash. Carpenters-Employers Pens. Fund *v.* 912
R. A. Gray & Co.; Pension Benefit Guaranty Corporation *v.* 912
Railway Clerks; Ellis *v.* 809
Raines; Duckett *v.* 908
Raines; Holguin *v.* 896
Raines; Wayne *v.* 914
Raja *v.* Michael Reese Hospital 846
Rajneesh *v.* McGreer 1065
Ramon-Perez *v.* United States 841
Ramsey County; Rio Vista Non-Profit Housing Corp. *v.* 1033
Randall *v.* Bailey 842
Randall *v.* Posner 841
Randall Book Corp. *v.* Maryland 919,1013
Ranier & Associates *v.* Waldschmidt 935
Ranier & Associates; Waldschmidt *v.* 935
Rankin *v.* United States 854
Rapides Parish School Bd. *v.* Valley 914
Rasky *v.* Chicago 874
Raup; Smart *v.* 999
Rayburn, *In re* 911
R. C. McEntire & Co.; Eastern Foods, Inc. *v.* 849
Redman; Meadows *v.* 1034
Redman *v.* Wainwright 984
Redmond *v.* United States 1071
Reed; Indiana Univ. Foundation *v.* 978
Reed *v.* Oklahoma 933
Reed *v.* Ross 1007,1036
Reed; Transocean Contractors, Inc. *v.* 1043
Reed *v.* United States 839,1038
Reese *v.* Alabama 838,1004
Reese Hospital; Raja *v.* 846
Regal *v.* Behul 994
Regal Crest Village of Brookfield *v.* Behul 994
Regan; South Carolina *v.* 807,888
Regan *v.* Wald 990
Regan *v.* Wright 888
Region 13 Mental Health-Mental Retardation Comm'n; Ordway *v.* 1067
Register of Copyrights; Multistate Legal Studies, Inc. *v.* 814
Rehner; Rice *v.* 874

Page
Reichert *v.* Morton Grove 863
Reid *v.* Department of Health and Mental Hygiene 843
Reid Brothers Logging Co.; Alaska Lumber & Pulp Co. *v.* 916
Reid Brothers Logging Co.; Ketchikan Pulp Co. *v.* 916
Reiner *v.* Bidlack 1051
Reiser; Leventhal *v.* 845
Reliance Ins. Co.; Hatch *v.* 1069
Republic of Guinea; Maritime Int'l Nominees Establishment *v.* 815
Republic Steel Corp.; Brown *v.* 891
Reseburg *v.* Texas 985
Resnick *v.* United States 895
Revenue Division; Pittsburg & Midway Coal Mining Co. *v.* 923
Rey *v.* United States 1038
Rhinehart; Seattle Times Co. *v.* 812,989
Rhodes *v.* Stewart 983
Rhodes *v.* United States 1012
Rice; Brown *v.* 1019
Rice *v.* Rehner 874
Richards *v.* Howard Univ. 1043
Richardson; Dallas County Comm'rs Court *v.* 1009
Richardson *v.* United States 854,890
Richmond *v.* Arizona 986
Rickards *v.* Canine Eye Registration Foundation, Inc. 994
Rickett *v.* United States 997
Ricketts; Guyton *v.* 897
Rife *v.* Nebraska 1070
Rio Vista Non-Profit Housing Corp. *v.* Ramsey County 1033
Rippetoe *v.* Mississippi 983
Rison; Long *v.* 1051
Rivera *v.* United States 1009
Rizk; Grimm *v.* 1045
Roadway Express, Inc. *v.* Warren 988
Robbins *v.* Marshall 940
Robbins; Prosser's Moving & Storage Co. *v.* 813,1015
Robbins; Schneider Moving & Storage Co. *v.* 813,1015
Roberson *v.* Estelle 934
Roberson *v.* McKaskle 1049
Robert K. Bell Enterprises, Inc. *v.* Donovan 1041
Roberts *v.* Florida 996
Roberts *v.* Moore 853
Roberts; Thigpen *v.* 1006
Roberts *v.* United States 845
Robinson *v.* Boyd 859
Robinson *v.* Dawson 840

Page
Robinson *v.* Johnson 836
Robinson *v.* New Mexico 851
Robinson; Smith *v.* 932
Robinson *v.* United States 1047
Robinson *v.* Warden, Md. State Penitentiary 984
Robles; LOT Polish Airlines *v.* 845,978
Robles; Polskie Linie Lotnicze *v.* 845,978
Roby *v.* Kansas 985
Rocap, *In re* 911
Roche; Watkins *v.* 805
Rochester; Quality Packaging Supply Corp. *v.* 828
Rockford *v.* Kaske 960
Rockland County *v.* Nuclear Regulatory Comm'n 993
Rockwell International Corp.; McKay *v.* 1043
Rodgers; Spence *v.* 804
Rodgers; United States *v.* 1007,1067
Rodman; Cosoff *v.* 822
Rodman *v.* United States 1001
Rodriguez *v.* Flota Mercante Grancolumbiana, S.A. 820
Rodriguez *v.* Wisconsin 914
Roemer *v.* United States 935
Rogers *v.* Rulo 1046
Rojas *v.* United States 1012
Rollins *v.* United States 933
Ronan *v.* Briggs 836,1003
Roncker; Cincinnati City School Dist. Bd. of Ed. *v.* 864
Rondon-Limonta *v.* United States 853
Ronson *v.* Walters 942
Ronwin; Hoover *v.* 810,980,989,1014
Ronwin *v.* Supreme Court of Ariz. 977
Rosa; Cantrell *v.* 821
Rosario *v.* United States 857
Rose *v.* Maryland 1072
Rose; National Cash Register Corp. *v.* 939
Rose *v.* United States 836
Rosenberg, *In re* 926
Rosewell; First National Bank & Trust Co. of Evanston *v.* 803
Rosi *v.* State Medical Bd 937
Ross; Reed *v.* 1007,1036
Roth *v.* Pritikin 961
Rotroff; Sammons *v.* 860
Rouse SI Shopping Center, Inc. *v.* Morse/Diesel, Inc. 936
Rousseau *v.* Nix 890
Routhier; Arizona *v.* 1073

Page
Rowan Cos.; Erftmier *v.* 1044
Rowan Cos. *v.* Marathon Pipeline Co. 820
Royse *v.* Corhart Refractories Co. 1072
Ruckelshaus *v.* Monsanto Co. 890
Ruckelshaus *v.* Natural Resources Defense Council, Inc. 810,927
Rudie; Church of Scientology of Portland *v.* 932
Rudolph *v.* Locke 835
Ruff *v.* United States 1051
Ruiz *v.* Cristo Rey Community Center 828
Ruiz *v.* Cupp 938
Rulo; Rogers *v.* 1046
Rumsey; Arizona *v.* 1038
Runte *v.* Hunter 858
Rush, *In re* 811
Rush *v.* United States Agency for International Development 1052
Rushen *v.* Spain 114
Russ *v.* U. S. Postal Service 998
Russell *v.* Florida 1070
Russello *v.* United States 16
Russell Stover Candies, Inc. *v.* Department of Revenue of Mont. 988
Russo *v.* United States 993,1045
Rust *v.* Ruvolo 826
Rutherford; Block *v.* 959
Rutter Rex Mfg. Co. *v.* United States 1008
Ruvolo; Rust *v.* 826
Ruzicka *v.* General Motors Corp. 982
R. W. T.; Dalton *v.* 1009
Ryan *v.* United States 844,855
S. *v.* Illinois 837,1004
Saavedra *v.* Donovan 892
Sabo; Smith-Bey *v.* 1011
Sack *v.* Kimberly-Clark Corp. 1045
Sacramento County; Burrell *v.* 893
S.A. Empresa de Viacao Aerea Rio Grandense; United States *v.* 810
Safecard Services, Inc. *v.* Dow Jones & Co., Inc. 831
Safron; Ganey *v.* 811
Sagan *v.* U. S. Supreme Court 962
Saintil *v.* United States 855
St. James Hospital *v.* Heckler 830
Saint Vincent Hospital; Salsbury *v.* 846
Salazar *v.* United States 996
Salinas *v.* Brier 835
Salkil *v.* Missouri 1010
Salman *v.* Commissioner 857

	Page
Salorio *v.* Glaser	993
Salorio; Glaser *v.*	993
Salsbury *v.* Erie County	825
Salsbury *v.* Saint Vincent Hospital	846
Salser *v.* United States	986
Sames; Gable *v.*	894
Sammons *v.* Livesay	964
Sammons *v.* Rotroff	860
Samuel *v.* United States	857
San Antonio; Plaza de las Armas, Inc. *v.*	994
San Antonio Metropolitan Transit Authority; Donovan *v.*	812,989,1035
San Antonio Metropolitan Transit Authority; Garcia *v.*	812,989,1035
San Carlos Apache Tribe; Arizona *v.*	874
Sanchez *v.* McFadden	961
Sanchez *v.* United States	844
Sand; Chase Manhattan Bank *v.*	1005
Sanders *v.* United States	841
San Diego; Parez *v.*	897
Sandlin *v.* North Carolina	995
Sandman; Sheet Metal Workers *v.*	847
Santa Clara Valley Water Dist. *v.* Martino	847
Santa Cruz County; Aptos Seascape Corp. *v.*	805
Santa Monica Hospital Medical Center; Brown *v.*	856,987
Santiago *v.* New York	817
Santiago *v.* Pennsylvania	805
Santiago *v.* United States	1045
Santiago-Gonzalez *v.* United States	862
Sasscer *v.* United States	1038
Sato; Merena *v.*	817
Sauer-Getreibe, KG; White Hydraulics, Inc. *v.*	1070
Scacchetti, *In re*	910
Schaaf; Chesapeake & Ohio R. Co. *v.*	848,987
Schacht; Arthur Andersen & Co. *v.*	1002
Schacht; Brown *v.*	1002
Schaefer; Kondrat *v.*	819
Schaefer *v.* National Labor Relations Bd.	945,1064
Schaefer *v.* Stone	1009
Schafer *v.* Sharp	1001
Scherer; Davis *v.*	1017
Schiavoni *v.* United States	890
Schilling; Telegraph Savings & Loan Assn. *v.*	992
Schiro *v.* Indiana	1003
Schlesinger, *In re*	1066
Schmidt *v.* Iowa	824

Page
Schmidt; Members of Jamestown School Committee *v.* 851
Schmidt *v.* United States 1041
Schneider Moving & Storage Co. *v.* Robbins 813,1015
School Dist. of Philadelphia; Ogrod *v.* 804
Schulman, *In re* 813
Schultz *v.* Alabama 1070
Schulz *v.* California 838
Schwanecke *v.* Harris County Hospital Dist. 846
Schwartz *v.* Maiden 984
Schwarz *v.* Coastal Resources Management 823,978
Scientific-Atlanta, Inc.; Quintanilla *v.* 1069
Scioto Trails Co. *v.* Ohio Dept. of Liquor Control 1034
Scoppa; Carpenter *v.* 962
Scott; Carpenters *v.* 875
Scott *v.* Sylvester 961
Scott *v.* United States 856
Scully; Clementi *v.* 833
Scully; Ganci *v.* 836
Sea-Land Service, Inc. *v.* Akermanis 1039
Sealy, Inc.; Ohio-Sealy Mattress Mfg. Co. *v.* 1002,1044
Seattle; Earle M. Jorgensen Co. *v.* 982
Seattle Times Co. *v.* Rhinehart 812,989
Second Judicial District Court of Nev.; Mianecki *v.* 806
Secrest *v.* South Dakota 802
Secretary of Agriculture; Banks *v.* 934
Secretary of Agriculture *v.* Community Nutrition Institute 991
Secretary of Agriculture; Hopi Indian Tribe *v.* 1056
Secretary of Agriculture; Navajo Medicinemen's Assn. *v.* 1056
Secretary of Agriculture; Wilson *v.* 956
Secretary of Army; Glover *v.* 990
Secretary of Army; Hannan *v.* 833,978
Secretary of Army; Sparano *v.* 830
Secretary of Commerce; Washington State Charterboat Assn. *v.* 1053
Secretary of Education; Grove City College *v.* 808,1005
Secretary of HHS; Attwell *v.* 941,1064
Secretary of HHS; Baltsavias *v.* 1050
Secretary of HHS; Campbell *v.* 1049
Secretary of HHS *v.* Community Health Services 812,980
Secretary of HHS; Crouch *v.* 898
Secretary of HHS; Fleshman *v.* 1049
Secretary of HHS; Goodman *v.* 839
Secretary of HHS; Guigno *v.* 984
Secretary of HHS; Health Care Plan of New Jersey, Inc. *v.* 815
Secretary of HHS; Iredell Memorial Hospital, Inc. *v.* 846

Page

Secretary of HHS; Iron Arrow Honor Society *v.* 67
Secretary of HHS; Johnson *v.* 839
Secretary of HHS; Johnson County Memorial Hospital *v.* 816
Secretary of HHS; Jones *v.* 1039
Secretary of HHS *v.* Lopez 879
Secretary of HHS; Neal *v.* 1000
Secretary of HHS; Ondrusek *v.* 998
Secretary of HHS; St. James Hospital *v.* 830
Secretary of HHS; Shope *v.* 991
Secretary of HUD; Maintenance Contractors, Inc. *v.* 993
Secretary of HUD; Miller *v.* 928
Secretary of HUD; Portsmouth Redevelopment & Housing Auth. *v.* 960
Secretary of HUD; Williams *v.* 1046
Secretary of Interior *v.* California 312,1065,1304
Secretary of Interior; California *v.* 312
Secretary of Interior *v.* Community for Creative Non-Viol. 812,989,1016
Secretary of Interior; Cuyahoga Valley Homeowners Assn. *v.* 1008
Secretary of Interior; Doria Mining & Engineering Corp. *v.* 1071
Secretary of Interior; James *v.* 1016
Secretary of Interior; Mashpee Tribe *v.* 1020
Secretary of Interior; Southern Pacific Transportation Co. *v.* 960,1064
Secretary of Interior; Yavapai-Prescott Indian Tribe *v.* 1017
Secretary of Labor; Building & Construction Trades Dept. *v.* 1069
Secretary of Labor *v.* Lone Steer, Inc. 408
Secretary of Labor; Master Printers Assn. *v.* 1040
Secretary of Labor; Mazzola *v.* 1040
Secretary of Labor; Metal Recycling Co. *v.* 849,1004
Secretary of Labor; Robert K. Bell Enterprises, Inc. *v.* 1041
Secretary of Labor; Saavedra *v.* 892
Secretary of Labor *v.* San Antonio Metro. Transit Auth. 812,989,1035
Secretary of Labor; Varkonyi *v.* 849,1004
Secretary of Navy; Boyd *v.* 1043
Secretary of Navy; Geiger *v.* 860
Secretary of Navy; Swain *v.* 814
Secretary of Navy; Wimmer *v.* 992
Secretary of Revenue of Kan.; Burlington Northern R. Co. *v.* 1067
Secretary of State; Cross *v.* 928,1016
Secretary of State of Ariz.; Joyner *v.* 1002
Secretary of Transportation; Clark *v.* 1038
Secretary of Treasury; South Carolina *v.* 807,888
Secretary of Treasury *v.* Wald 990
Secretary of Treasury *v.* Wright 888
Securities and Exchange Comm'n *v.* Jerry T. O'Brien, Inc. 1038
Securities Industry Assn. *v.* Board of Governors, FRS 812,1015

Page
Segrest *v.* Segrest 894
Selective Service System *v.* Minn. Public Interest Research Gp. 1006
Sellevold; Bell *v.* 1070
Sellner *v.* Hudnall 1046
Seltzer *v.* Peach 860
S. E. Nichols of Ohio, Inc. *v.* National Labor Relations Bd. 914
Serio *v.* Maggio 999
Servidio *v.* United States 942
Shackelford *v.* United States 899
Shaff *v.* United States 821
Shaffer-Corona *v.* Smith 1072
Shaheed *v.* Adam Metal & Supply Co. 892
Shannon *v.* Harmsen 822
Shapiro, *In re* 1067
Shapiro *v.* United States 828
Sharp; Schafer *v.* 1001
Sharp *v.* Washington 983
Sharpe *v.* United States 857
Shawnee Mission Pub. Schools, Unified School Dist. No. 512; Boyd *v.* 838
Shedd *v.* Higgs 997
Shedler; Yalkowsky *v.* 916
Sheehan, *In re* 957
Sheet Metal Workers *v.* Sandman 847
Sheet Metal Workers Pension Plan; Baer Mfg., Inc. *v.* 994
Shell Oil Co. *v.* Olsen 1045
Shell Petroleum N. V. *v.* Franchetti 1012
Shelter Framing Corp.; Carpenters Pension Trust for So. Cal. *v.* 912
Shepherdsville; Adams *v.* 895
Sheppard; Massachusetts *v.* 888,1034
Shields *v.* United States 816
Shimer; Mally *v.* 1072
Shirilla *v.* Smallwood 993
Shope *v.* Heckler 991
Shouldice; Stern *v.* 993
Shreveport; Humphrey *v.* 849
Siano *v.* Justices of Mass. 819
Siano *v.* United States Fidelity & Guaranty Co. 819
Sidoti; Palmore *v.* 913,1035
Sielaff; Larsen *v.* 956
Sikorski *v.* Den Norske Amerikalinje 1048
Silkwood *v.* Kerr-McGee Corp. 238
Siller *v.* Hartz Mountain Associates 961
Silsdorf; Levine *v.* 831
Silva *v.* Arizona 999

Page
Silverberg, Marvin & Swaim, P. C.; Malachowski *v.* 850
Silverman; Weigang *v.* 804
Silverstein; Henderson *v.* 864
Simmerson *v.* United States 896
Simmons *v.* Arkansas 865
Simmons *v.* United States 835
Simpson *v.* Isringhausen 1072
Simpson *v.* Pennsylvania 822
Simpson *v.* United States 942
Sims, *In re* 811
Simutis *v.* Daniunas 822
Sinema, *In re* 1066
Singer; Vu *v.* 938
Singleton *v.* Virginia Electric & Power Co. 864
Siroonian *v.* New York Foundling Hospital 941
Siskiyou County; Turner *v.* 928
Sivright *v.* United States 861
Skaggs *v.* Crawford County 1019
Skaggs Cos. *v.* Whatley 938
Skyline Corp.; Posey *v.* 960
Slay *v.* United States 1050
Slevin *v.* New York City 1017
Sloan *v.* McKaskle 1048
Small Business Administration; Carter *v.* 1043
Small Business Administration; Carter Enterprises of Denver *v.* 1043
Small Business Administration; Walton *v.* 1009
Smallwood; Shirilla *v.* 993
Smart *v.* Raup 999
Smith, *In re* 811
Smith *v.* Arkansas 890
Smith; Brummer *v.* 823
Smith; Chavez *v.* 823
Smith *v.* Clark 859
Smith; Cohen *v.* 939
Smith; Committee for an Independent P-I *v.* 892
Smith; Dock *v.* 854
Smith; Fitzpatrick *v.* 963,1064
Smith *v.* Government of Virgin Islands 987
Smith *v.* Harmsen 822
Smith *v.* Heeringa 1045
Smith *v.* Kemp 1003,1032
Smith; Kemp *v.* 807
Smith *v.* Lockhart 832
Smith *v.* Lubbers 996

Page
Smith *v.* Lucas 899
Smith *v.* Maggio 831
Smith *v.* Missouri 908
Smith *v.* Morris 984
Smith; Mosley *v.* 984
Smith *v.* North Carolina 918
Smith *v.* Oklahoma 858,924
Smith; Pawlyshyn *v.* 844
Smith *v.* Robinson 932
Smith; Shaffer-Corona *v.* 1072
Smith *v.* United States 806,848,908
Smith *v.* U. S. Civil Service Comm'n 1051
Smith-Bey *v.* Sabo 1011
Smith International, Inc. *v.* Hughes Tool Co. 996
Smitty Baker Coal Co. *v.* Federal Mine Safety Review Comm'n 851
Smyser; Wise *v.* 840
Snead *v.* United States 914
Snow *v.* Quinault Indian Nation 1036
Snow *v.* Quinault Tribe 1036
Solem *v.* Bartlett 809
Solem; Nerison *v.* 1072
Solem *v.* Stumes 808
Solon; Solon Baptist Temple, Inc. *v.* 847
Solon Baptist Temple, Inc. *v.* Solon 847
Solyom *v.* Maryland-National Capital Park and Planning Comm'n 801
Sommer *v.* Dixon 857
Sony Corp. of America *v.* Universal City Studios, Inc. 417
Soto-Duran *v.* United States 844
South Bend Community School Corp.; Frame *v.* 815
South Carolina; Adams *v.* 1023
South Carolina; Barwick *v.* 938,1064
South Carolina; Bissette *v.* 828
South Carolina; Blanton *v.* 826
South Carolina; Dantzler *v.* 1044
South Carolina; Gibson *v.* 913
South Carolina; Hess *v.* 827,995
South Carolina; Hoffman *v.* 821
South Carolina *v.* Regan 807,888
South Carolina *v.* Wright 888
South-Central Timber Development, Inc. *v.* LeResche 890,1034
South Dakota; Koenig *v.* 940
South Dakota *v.* Lower Brule Sioux Tribe 1042
South Dakota; Secrest *v.* 802
South Dakota Land Title Assn.; First American Title Co. of S. D. *v.* 1042

Page
Southeastern Pa. Transportation Auth.; Transportation Union *v.* 825
Southeast Volusia Hospital Dist. *v.* Florida Patient's Comp. Fund 1066
Southern Pacific Transportation Co. *v.* Secretary of Interior 960,1064
Southern R. Co.; Pace *v.* 1018
Southern Union Exploration Co. of Texas; Wynn Oil Co. *v.* 893
South Park Independent School Dist. *v.* United States 824
South Street Seaport Museum *v.* McCarthy 1067
SouthTrust Bank of Alabama *v.* Visa, U.S.A., Inc. 826
Souza *v.* Ellerthorpe 1048
Sovereign News Co. *v.* United States 814
Sowards *v.* United States 1052
Sowders; Maratty *v.* 837
Sowders; Mayes *v.* 985
Spain; Rushen *v.* 114
Spalding; Myers *v.* 859
Sparano *v.* Secretary of Army 830
Sparks *v.* United States 842
Spaulding *v.* Louisiana 851
Spaziano *v.* Florida 1038
Spence *v.* Rodgers 804
Spinney *v.* Massachusetts 834
Spotville *v.* Maggio 841
Spradlin *v.* Nebraska 1011
Spradlin; Whisenhunt *v.* 965
Spriggs *v.* Texas 897
Springfield; McCarren *v.* 942
Springfield; Vickroy *v.* 938
Srubar *v.* Department of Treasury 1012
S & S Machinery Co. *v.* Masinexportimport 850
S.S. Nancy Lykes *v.* General Electric Co. 849
Stahl *v.* Oklahoma 1069
Standard Oil Co. (Indiana); Astilleros Espanoles, S.A. *v.* 864
Standard Oil Co. of California; California *v.* 811,1068
Standard Sewing Equipment Corp.; Trans-World Sewing Mach. *v.* 937
Stanley *v.* Florida 1010
Starling *v.* Estelle 842
Starr; Mullen *v.* 978
State. See name of State.
State Bank of St. Charles *v.* Camic 995
State Bd. of Equalization *v.* Trailer Train Co. 846
State Bd. of Examiners; Idaho *ex rel.* Moon *v.* 992
State Department of Mass.; Udell *v.* 1000
State Lands Comm'n; Summa Corp. *v.* 888
State Medical Bd.; Rosi *v.* 937

Page
State Medical Bd.; Storrs *v.* 937
Stauffer Chemical Co.; United States *v.* 165
Stearns *v.* United States 1047
Steebe *v.* U. S. Railroad Retirement Bd. 997
Steele *v.* Lamar 821
Steele; Thompson *v.* 897
Steelworkers; Thomas *v.* 839
Stengl *v.* Morton Grove 863
Stephan; Kinnell *v.* 854
Stephens *v.* Kemp 1027
Stephenson; Holder *v.* 897
Stern, *In re* 807
Stern *v.* Shouldice 993
Stevenson *v.* Conrad 857,978
Stewart; Rhodes *v.* 983
Stickler; Arnold Industries, Inc. *v.* 909
Stillman *v.* United States 936
Stilphen; Penobscot Nation *v.* 923
Stinson *v.* New York 1010
Stinson *v.* Wainwright 984
Stockley; Graves *v.* 999
Stokes *v.* United States 835,836
Stone; Schaefer *v.* 1009
Stony Brook Hospital; Weber *v.* 1026
Storrs *v.* State Medical Bd. 937
Stotts; Firefighters *v.* 808
Stotts; Memphis Fire Dept. *v.* 808
Stouffer Corp. *v.* Prudential Ins. Co. of America 846,1004
Strassner *v.* Strassner 936,1013
Strickland; Antone *v.* 1003,1064
Strickland; Ford *v.* 865
Strickland *v.* Washington 810
Stroh, *In re* 910
Strong *v.* Maggio 1071
Struthers Patent Corp. *v.* Nestle Co. 915
Stuart-Western, Inc. *v.* Cooling Systems & Flexibles, Inc. 962
Studiengesellschaft Kohle m.b.H.; U. S. S. Polypropylene Div. *v.* 939
Stumes; Solem *v.* 808
Sturm, Ruger & Co. *v.* Zahrte 961
Suarez; Fundacion Educativa Ana G. Mendez *v.* 879
Suarez *v.* United States 996
Sudar *v.* United States 840
Sullivan *v.* Vernon 850
Sullivan *v.* Wainwright 109,922

Page
Sumlin *v.* Engle 834
Summa Corp. *v.* California *ex rel.* State Lands Comm'n 888
Sumner; Locks *v.* 933
Sumner *v.* Mata 957
Sumrall *v.* Maryland 1050
Su Nai-Chao *v.* Boeing Co. 1017
Sun Chemical Corp. *v.* United States 819
Sun Oil Co. (Delaware); Nations *v.* 893
Superintendent of penal or correctional institution. See name or title of superintendent.
Superior Court of Cal., Los Angeles County; Fobes *v.* 853
Superior Court of Cal., Los Angeles County; National Enquirer *v.* 810
Superior Court of Cal., Orange County; Jones *v.* 998
Superior Court of Cal., Riverside County; Press-Enterprise Co. *v.* 501
Superior Court, San Joaquin Cty.; Delta Farms Reclamation Dist. *v.* 915
Superior Oil Co. *v.* Pioneer Corp. 1041
Supreme Court of Ariz.; Ronwin *v.* 977
Supreme Court of Iowa; Logan *v.* 910
Supreme Court of S. C.; Fogle *v.* 982
Sure-Tan, Inc. *v.* National Labor Relations Bd. 808,889,912
Sutton *v.* Bloom 1073
Sutton *v.* United States 826
S & Vee Cartage Co. *v.* United States 935
Swain *v.* Lehman 814
Sweetman *v.* Pennsauken 1036
Sydnor *v.* Maryland 1048
Sylvester; Scott *v.* 961
Syria *v.* Alexander 874
T.; Dalton *v.* 1009
Tabenken, *In re* 957
Tabone *v.* Posner 848
Talbert *v.* United States 1052
Tamilio *v.* Fogg 1041
Tampa; Warren *v.* 899
Tango *v.* New Jersey 849
Tarkowski, *In re* 1068
Tarpley; McKaskle *v.* 1002
Tatro; Irving Independent School Dist. *v.* 1007
Tatu *v.* Davis 979
Tax Comm'r of Ohio *v.* Boothe Financial Corp. 1057
Tax Comm'r of Ohio *v.* Hooven & Allison Co. 813,990
Tax Comm'r of W. Va.; Armco Inc. *v.* 1016
Taylor; Alabama *v.* 950
Taylor *v.* Curry 1000

	Page
Taylor; Howard *v.*	839
Taylor *v.* Lawson Milk Co.	848
Taylor *v.* Quick	853
Taylor Machine Works, Inc.; Philadelphia Lift Truck Corp. *v.*	848
Teague *v.* Illinois	867
Teal *v.* Morrison-Knudsen Co.	824
Teamsters; Anchor Motor Freight, Inc. *v.*	819
Teamsters *v.* National Labor Relations Bd.	827,912
Teamsters *v.* Pawlak	1042
Teamsters; Wald *v.*	1000
Tejeda-Gallegos *v.* United States	917
Teledyne Movible Offshore, Inc. *v.* Thompson	802
Telegraph Savings & Loan Assn. *v.* Schilling	992
Telford; Clackamas County Housing Authority *v.*	1070
Tennessean; Windsor *v.*	1016
Tennessee; Coe *v.*	1063
Tennessee; Laney *v.*	1003
Tennessee Dept. of Employment Security; Johnson *v.*	1019
Tenorio-Bohoroquez *v.* United States	997
Term Con Electronics *v.* AMP Inc.	915
Terramar Beach Community Improvement Assn., Inc. *v.* Carrithers	981
Territory. See name of Territory.	
Texas; Alexander *v.*	928
Texas; Alvarez *v.*	849
Texas; Ashby *v.*	985
Texas; Banks *v.*	904
Texas; Bennett *v.*	963
Texas; Bridges *v.*	838,1004
Texas; Christiansen *v.*	985
Texas; Clayton *v.*	1046
Texas; Crowder *v.*	1013
Texas; De La Rosa *v.*	865,1064
Texas; Evans *v.*	925
Texas; Gant *v.*	836,1048
Texas *v.* Garza	863
Texas; Ivy *v.*	933
Texas; Jernigan *v.*	986
Texas *v.* KVUE-TV, Inc.	1006
Texas; Marquez *v.*	802
Texas; McClure *v.*	841
Texas; McDaniel *v.*	891
Texas; Mitchell *v.*	1073
Texas; Noe *v.*	997,1064
Texas; Parker *v.*	997

Page
Texas *v.* Platoro Ltd., Inc. 818
Texas; Reseburg *v.* 985
Texas; Spriggs *v.* 897
Texas *v.* United States 933
Texas Dept. of Human Resources; Williams *v.* 1070
Theisen *v.* United States 1051
Theriault *v.* Federal Bureau of Prisons 862
Thezan *v.* Maritime Overseas Corp. 1050
Thigpen; Bell *v.* 843
Thigpen *v.* Roberts 1006
Thoma *v.* United States 1047
Thomas *v.* Cox 918
Thomas *v.* Maggio 1051
Thomas *v.* Oklahoma 842
Thomas *v.* Steelworkers 839
Thomas *v.* United States 890,998,1052,1074
Thomassen, *In re* 811
Thompkins *v.* Marshall 853
Thompson *v.* Hedrick 916
Thompson; Hoskins *v.* 964
Thompson *v.* International Harvester Co. 1043
Thompson *v.* Moorman 982
Thompson *v.* Nelson 829
Thompson *v.* Steele 897
Thompson; Teledyne Movible Offshore, Inc. *v.* 802
Thompson *v.* Thompson 895
Thompson *v.* United States 963,1017,1039,1050
Thompson; Wainwright *v.* 988
Thomson; A.D.M. Corp. *v.* 938
Thornton; Brown & Root, Inc. *v.* 1052
Thornton; Faison *v.* 896
Thornton; Holway *v.* 850
Tijerina *v.* Florida 998
Tilford *v.* Commissioner 932
Tillman *v.* Van Ness 861
Timson, *In re* 811
Tinnen *v.* United States 844
Tip Top, Faberge, Inc.; Guy *v.* 964
T. L. O.; New Jersey *v.* 991
T.N.T. Marine Service, Inc. *v.* Weaver Shipyards & Drydocks, Inc. 847
Tokar *v.* Hearne 844
Tolbert *v.* United States 933
Tolk *v.* Weinsten 1010
Tomlinson Court Apartments; Ogrod *v.* 803

Page
Toneman *v.* Burkhart 838
Tong *v.* California 850
Tootsie Roll Industries, Inc.; Metz *v.* 1070
Torpy *v.* United States 856,1027
Torres-Valencia *v.* United States 44
Tower *v.* Glover 813
Town. See name of town.
Towner *v.* Vanderbilt Univ. 827
Towns *v.* United States 1012
Trailer Train Co.; State Bd. of Equalization *v.* 846
Transamerica Computer Co. *v.* International Business Machines 955
Transocean Contractors, Inc. *v.* Reed 1043
Transportation Union *v.* Southeastern Pa. Transportation Authority 825
Trans World Airlines, Inc.; Dean *v.* 995
Trans World Airlines, Inc. *v.* Franklin Mint Corp. 809,889
Trans World Airlines, Inc.; Franklin Mint Corp. *v.* 809,889
Trans World Airlines, Inc.; Hedley *v.* 847
Trans World Airlines, Inc. *v.* N. Y. Human Rights Appeal Bd. 811,1065
Trans-World Sewing Machine Co. *v.* Standard Sewing Equipment 937
Trapnell *v.* O'Brien 838
Travelers Indemnity Co. *v.* Ewing, Cole, Erdman & Eubank 1041
Treasurer of Idaho *v.* State Bd. of Examiners 992
Treuber, *In re* 911,1066
Trimble & Sons, Ltd. *v.* Kingsley & Keith (Canada) Ltd. 982
Trombetta; California *v.* 1037
Truckee-Carson Irrigation Dist.; Pyramid Lake Paiute Tribe *v.* 863,875
Truckee-Carson Irrigation Dist. *v.* United States 875
Trussell *v.* Estelle 853
Trustees of Rex Hospital *v.* Hospital Building Co. 890
Trustees of Rex Hospital; Hospital Building Co. *v.* 904,1003
Tsanos *v.* Division of Administration, Fla. Dept. of Transp. 852,1004
Tucker *v.* London Gold Exchange 897,987
Tully; Kourakos *v.* 1070
Tung Lam *v.* United States 942
Turel *v.* United States 1046
Turner *v.* Siskiyou County 928
Turner *v.* Wainwright 999
Tuscarora Intermediate Unit No. 11; Nelson *v.* 866
Tuscarora Intermediate Unit No. 11; Nelson House *v.* 866
Tutt *v.* United States 855
Tyler *v.* Maggio 857
Ubaldi; Connecticut *v.* 916
Udell *v.* State Department of Mass. 1000
Udofot *v.* United States 896

Page
UMIC Government Securities, Inc.; LTV Federal Credit Union *v.* 852
UNC Resources, Inc.; Benally *v.* 983
Unger *v.* Consolidated Foods Corp. 1017
Unger *v.* United States 934
Union. For labor union, see name of trade.
Union Carbide Corp.; Karapinka *v.* 892,1004
Union Oil Co. of California *v.* Eagerton 801
Union Oil Co. of California; Environmental Designs, Ltd. *v.* 1043
Union State Bank; Miller *v.* 1019
United. For labor union, see name of trade.
United Parcel Service *v.* National Labor Relations Bd. 960
United Parcel Service; National Labor Relations Bd. *v.* 979
United Parcel Service; Pendleton *v.* 817
United Parcel Service; White *v.* 860
United Scottish Ins. Co.; United States *v.* 810
United States. See name of other party.
United States Agency for International Development; Rush *v.* 1052
U. S. Army Corps of Engineers; Lake Erie Alliance *v.* 915
United States Brewers Assn., Inc.; Healy *v.* 909
U. S. Bureau of Prisons; Powell *v.* 832
United States Catholic Conference "Caritas"; Chylicka *v.* 1019
U. S. Civil Service Comm'n; Smith *v.* 1051
U. S. District Court; Herzfeld *v.* 815
U. S. District Court; Letnes *v.* 992
U. S. District Judge; Alside, Inc. *v.* 866
U. S. District Judge; Bergen *v.* 845
U. S. District Judge; Chase Manhattan Bank (National Assn.) *v.* 1005
U. S. District Judge; Chevron Chemical Co. *v.* 814
U. S. District Judge; Giddings & Lewis Machine Tool Co. *v.* 864
U. S. District Judge; N. M. *ex rel.* "One Minute of Silence" Stat. *v.* 982
U. S. District Judge; Schafer *v.* 1001
U. S. Fidelity & Guaranty Co.; Hayes Oilfield Construction Co. *v.* 818
U. S. Fidelity & Guaranty Co.; Siano *v.* 819
U. S. Information Agency; Balk *v.* 821
U. S. International Communication Agency; Balk *v.* 892
United States Jaycees; Gomez-Bethke *v.* 1037
U. S. Magistrate; Wise *v.* 840
U. S. Parole Comm'n; Hobson *v.* 862
U. S. Parole Comm'n; Illsley *v.* 1001
U. S. Postal Service; Boylan *v.* 959
U. S. Postal Service; Franchise Tax Bd. of Cal. *v.* 1037
U. S. Postal Service; Guy *v.* 835
U. S. Postal Service; Leach *v.* 814
U. S. Postal Service; Marks *v.* 1011

Page
U. S. Postal Service; Russ *v.* 998
U. S. Postal Service; Wham *v.* 860,1064
U. S. Railroad Retirement Bd.; Steebe *v.* 997
United States Steel Corp.; Gadomski *v.* 1003
U. S. Supreme Court; Sagan *v.* 962
Universal City Studios, Inc.; Sony Corp. of America *v.* 417
Universal Restaurants, Inc. *v.* Fellows 828
University College of Univ. of Ala. *v.* Johnson 994
University of Mich.; Minye *v.* 899,1005
Unterthiner *v.* Desert Hospital Dist. of Palm Springs 928,1068
Upjohn Co. *v.* Mauldin 848
Uplinger; New York *v.* 812,1015,1035
Upper East Tenn. Human Development Agency; Bruce *v.* 854,1004
U. S. S. Polypropylene Division *v.* Studiengesellschaft Kohle m.b.H. 939
Utah; Fullmer *v.* 910
Utah; Gibson *v.* 894
Utility Trailer Sales Co. *v.* Machinists 1005
Vail; Board of Ed. of Paris Union School Dist. No. 95 *v.* 813
Valenzuela *v.* Office of Personnel Management 856
Valley; Holloway *v.* 914
Valley; Rapides Parish School Bd. *v.* 914
Van Almen *v.* Marshall 899
Van Bens *v.* United States 842
Vance; Bagby *v.* 891
Vance *v.* Bordenkircher 833
Vanda *v.* Illinois 841
Vanderbilt Univ.; Towner *v.* 827
Vander Jagt *v.* O'Neill 823
Vandoren, *In re* 910
VanDyke *v.* Wawrzaszek 1020
Van Dyke *v.* Wisconsin 833
Van Emmerik *v.* Montana Dakota Utilities Co. 915
Van Meter *v.* United States 962
Vann *v.* United States 847
Vann *v.* Wainwright 1050
Van Ness; Tillman *v.* 861
Varella *v.* United States 838
Varig Airlines; United States *v.* 810
Varkonyi *v.* Donovan 849,1004
Vasquez; Joiner *v.* 981
Vaughn; Westinghouse Electric Corp. *v.* 913,1033
Veenkant *v.* Blake 874,1004
Veenkant *v.* Cook 1009,1074
Veenkant *v.* Corsiglia 874

Page
Veenkant *v.* Gurn 851,1004
Veenkant *v.* Wesler 851,1004
Vela; McKaskle *v.* 1053
Vella *v.* Federal Bureau of Investigation 1050
Veneri *v.* Brackman 1050
Verdeyen; DeVincent *v.* 899
Vernon; Columbia Poly Pack Co. *v.* 850
Vernon; Sullivan *v.* 850
Verrussio *v.* United States 935
Veterans Administration; Wiginton *v.* 995
Veteto *v.* United States 839
Veteto *v.* Warden, U. S. Penitentiary 891
Viccarone *v.* United States 841
Vickroy *v.* Springfield 938
Village. See name of village.
Vine; Nevada *v.* 977
Vinzant *v.* King 965
Virginia; Anderson *v.* 980,1046
Virginia; Bunch *v.* 977,1064
Virginia; Harris *v.* 1011
Virginia; Levasseur *v.* 1063
Virginia; Levy *v.* 855
Virginia; Peterson *v.* 865,1004
Virginia Electric & Power Co.; Singleton *v.* 864
Virgin Islands; Blyden *v.* 832
Virgin Islands; El-Amin *v.* 831,987
Virgin Islands; George *v.* 832
Virgin Islands; Lambertis *v.* 1046
Virgin Islands; Leycock *v.* 917
Virgin Islands; Smith *v.* 831,987
Visa, U.S.A., Inc.; SouthTrust Bank of Alabama *v.* 826
V. J. S. *v.* Illinois 837,1004
Volkswagen of America, Inc.; Pierce *v.* 859
Volkswagenwerk A. G. *v.* Falzon 811
Vons Foodmarkets; Piatkowska *v.* 856,1004
Vu *v.* Singer 938
Vuksta *v.* Bethlehem Steel Corp. 835
Wachsman *v.* Dallas 1012
Wachter *v.* Green 941
Waddington; Forbes *v.* 837
Wagman *v.* Lee 819
Wagner *v.* Colorado 829
Wainwright; Adams *v.* 1063
Wainwright; Booker *v.* 922

Page
Wainwright; Brown *v.* 1019
Wainwright; Buford *v.* 956
Wainwright; Deal *v.* 858
Wainwright; Evans *v.* 860
Wainwright *v.* Giardino 965
Wainwright *v.* Goode 78
Wainwright; Johnson *v.* 1011
Wainwright; Keenan *v.* 891
Wainwright; McKinon *v.* 896
Wainwright; Owens *v.* 834
Wainwright; Presley *v.* 838
Wainwright *v.* Proffitt 1002
Wainwright; Proffitt *v.* 1003
Wainwright; Redman *v.* 984
Wainwright; Stinson *v.* 984
Wainwright; Sullivan *v.* 109,922
Wainwright *v.* Thompson 988
Wainwright; Turner *v.* 999
Wainwright; Vann *v.* 1050
Wainwright; Woods *v.* 981
Wald; Regan *v.* 990
Wald *v.* Teamsters 1000
Waldschmidt *v.* Ranier & Associates 935
Waldschmidt; Ranier & Associates *v.* 935
Walgren, *In re* 957
Walker *v.* Dugger 918
Walker *v.* Maggio 842
Walker *v.* Marshall 962
Walker; Marshall *v.* 951
Walker *v.* United States 1047
Wallace *v.* Lockhart 934
Waller *v.* Georgia 959
Walsh *v.* United States 825
Walt Disney World Co.; Kazanzas *v.* 982
Walters; Ronson *v.* 942
Walton *v.* Small Business Administration 1009
Wambheim *v.* J. C. Penney Co. 1036
Ward *v.* Owens 1050
Ward *v.* United States 861,862,940
Ward *v.* Wisconsin 1047
Warden. See also name of warden.
Warden, Clinton Correctional Facility; Coniglio *v.* 822
Warden, Fort Pillow State Farm; Haggins *v.* 1071
Warden, Md. State Penitentiary; Robinson *v.* 984

Page
Warden, Powhatan Correctional Center; Bowring *v.* 934
Warden, U. S. Penitentiary; Veteto *v.* 891
Ware *v.* Owens-Illinois, Inc. 861
Warner *v.* United States 862
Warren *v.* Commissioner 830
Warren; Roadway Express, Inc. *v.* 988
Warren *v.* Tampa 899
Washington; Blevins *v.* 1043
Washington; Bonds *v.* 831
Washington *v.* Commissioner 985
Washington; Flygare *v.* 854
Washington *v.* New York City Bd. of Estimate 1013
Washington *v.* New York Comm'r of Correctional Services 1045
Washington; Oziemkiewicz *v.* 1044
Washington; Sharp *v.* 983
Washington; Strickland *v.* 810
Washington County Hospital Assn., Inc. *v.* Morrison 864
Washington Dept. of Corrections; Groce *v.* 942
Washington Dept. of Revenue; Chicago Bridge & Iron Co. *v.* 1013
Washington Metropolitan Area Transit Auth. *v.* Johnson 1068
Washington Metropolitan Area Transit Auth.; One Parcel of Land *v.* 893
Washington Metropolitan Area Transit Auth.; Williams *v.* 1070
Washington Post Co.; Department of State *v.* 812,979
Washington State Charterboat Assn. *v.* Baldrige 1053
Washington State Dept. of Social & Health Services; Baird *v.* 843
Wasman *v.* United States 932
Wassaic Developmental Center; Prasad *v.* 834,1064
Waterhouse *v.* Florida 977
Waterhouse *v.* Oregon 853
Waters, *In re* 889
Waters *v.* California 1048
Watkins *v.* Roche 805
Watson *v.* Bartlett 819
Watt *v.* Community for Creative Non-Violence 812
Watts *v.* United States 857
Wauwatosa Fire Dept. *v.* Orzel 992
Wawrzaszek; VanDyke *v.* 1020
Wayne *v.* Raines 914
Weathersby *v.* Morris 1046
Weaver *v.* Pennsylvania 835
Weaver Shipyards & Drydocks, Inc.; T.N.T. Marine Service, Inc. *v.* 847
Webb *v.* Hutto 1034
Webb *v.* United States 1071
Webber *v.* United States 986

Page
Weber *v.* Stony Brook Hospital 1026
Webster; Jabara *v.* 863
Webster *v.* United States 815
Weddell *v.* United States 859
Weech *v.* United States 914
Weeks *v.* United States 917
Weigang *v.* Silverman 804
Weinberger; Coyne *v.* 818
Weinberger; Lewy *v.* 818
Weiner; Alside, Inc. *v.* 866
Weiner *v.* United States 962
Weinsten; Tolk *v.* 1010
Weiss; Ogrod *v.* 804
Weiss *v.* United States 915
Weldon; Davis *v.* 896
Wells; Durham County Bd. of Alcoholic Control *v.* 1044
Wells Fargo Business Credit; Ben Kozloff, Inc. *v.* 818
Wesler; Veenkant *v.* 851,1004
West; Lacour *v.* 837
West *v.* Mississippi 963
West Branch; McDonald *v.* 813
Westbrook *v.* Hutchinson Crane Excavating Co. 994
West Coast Media, Inc. *v.* Federal Communications Comm'n 816
Western Co. of North America *v.* United States 892,1004
Western Contracting Corp.; Grace *v.* 828
Western Employers Ins. Co. *v.* Merit Ins. Co. 1009
Western Food Equipment Co. *v.* Foss America, Inc. 825,1003
Western Oil & Gas Assn. *v.* California 312,1065,1304
Western States Bankcard Assn.; Electronic Currency Corp. *v.* 983
Westinghouse Electric Corp. *v.* Vaughn 913,1033
West Linn; Betka *v.* 979
Weston *v.* Bachman 824
Weston *v.* United States 962
West Virginia; Audia *v.* 934
West Virginia; Mollohan *v.* 832
Whalen *v.* United States 841
Wham *v.* U. S. Postal Service 860,1064
Whatley; Skaggs Cos. *v.* 938
Wheelabrator-Frye, Inc.; Coastal Steel Corp. *v.* 938
Wheeling *v.* Commissioner 862,1005
Whirlpool Corp.; Greene *v.* 1042
Whisenhunt *v.* Spradlin 965
White *v.* Colorado 998
White *v.* United Parcel Service, Inc. 860

Page
White *v.* United States 1045
White *v.* White 848
White Hydraulics, Inc. *v.* Sauer-Getriebe, KG 1070
Whiteman *v.* United States 862
Whiteside *v.* Parke 843
Whittington *v.* McKaskle 983
Wichita Bd. of Trade *v.* United States 1069
Wiggins; Estelle *v.* 809
Wiginton *v.* Veterans Administration 995
Wilcox & Schlosser; O'Brien *v.* 819
Wilford *v.* Jago 891
Wilford *v.* United States 1039
Wilkinson; John *v.* 985
Wilkinson; Yeager *v.* 861
Willey; Coahoma Bank *v.* 849
Willey; Grenada Bank *v.* 849
Williams, *In re* 1016
Williams *v.* Air Transport Union 858
Williams; Bartlett *v.* 801
Williams; Bennett *v.* 932
Williams *v.* DeRobertis 1072
Williams *v.* King 1027
Williams *v.* Ladner 850
Williams; Maggio *v.* 46
Williams; Nix *v.* 810
Williams *v.* North Carolina 865,1004
Williams *v.* Ohio 1020
Williams *v.* Oklahoma 963
Williams *v.* Pepsi-Cola Bottling Co. 898
Williams *v.* Pierce 1046
Williams *v.* Texas Dept. of Human Resources 1070
Williams *v.* United States ... 837,840,859,898,940,941,986,991,1004,1007
Williams *v.* Washington Metropolitan Area Transit Authority 1070
Williamson *v.* Wisconsin 1018
Wilson *v.* Block 956
Wilson *v.* Commissioner 987
Wilson *v.* Dunn 999
Wilson *v.* Georgia 865,1004
Wilson *v.* Maryland 1049
Wilson; Parrott *v.* 936
Wilson *v.* United States 867
Wimmer *v.* Lehman 992
Winans; Blatchford *v.* 1033
Winans; Martinez *v.* 837

Page
Windsor *v.* Tennessean 1016
Winpenny *v.* Montemuro 1001
Winston-Salem; Baldwin *v.* 1012
Wintrey *v.* Breed 836
Wintrey *v.* Breed & Associates 836
Wisconsin; Abramoff *v.* 994
Wisconsin; Knapp *v.* 834
Wisconsin; Novack *v.* 867
Wisconsin; Rodriguez *v.* 914
Wisconsin; Van Dyke *v.* 833
Wisconsin; Ward *v.* 1047
Wisconsin; Williamson *v.* 1018
Wise *v.* Smyser 840
Wold *v.* Bull Valley Management Co. 936
Wolff; Knights *v.* 1000
Wolff; Littleton *v.* 837
Wolfgram *v.* Bombardier Ltd. 829
Womack *v.* Alabama 986
Wong *v.* United States 842
Woo Chin Tong *v.* California 850
Wood *v.* Oklahoma 855
Wood *v.* United States 959
Woodard *v.* Hutchins 377
Woodcrest Nursing Home; Goldberg *v.* 849
Woodkraft Division, Ga. Kraft Co. *v.* National Labor Relations Bd. 981
Woodruff *v.* Angus 830
Woods *v.* Wainwright 981
Woodside *v.* Postmaster General 822
Woodson *v.* United States 857
Workers' Compensation Appeals Bd.; Cheechako Leasing Co. *v.* .. 894
Wright; Allen *v.* 888
Wright *v.* Associates Financial Services Co. of Oregon, Inc. 834
Wright *v.* Defense Logistics Agency 817
Wright *v.* Griffin 831
Wright *v.* New York Life Ins. Co. 862,978
Wright; Regan *v.* 888
Wright; South Carolina *v.* 888
Wuagneux *v.* United States 814
Wynmoor Ltd. Partnership *v.* Coconut Creek Cable T.V., Inc. ... 1033
Wynn Oil Co. *v.* Southern Union Exploration Co. of Texas 893
Wynshaw *v.* United States 822
Wyoming; Auclair *v.* 909
Wyoming; Hopkinson *v.* 908
Wyrick; Cutts *v.* 1011

Page
Wyrick; Fields *v.* 1020
Wyrick; McCrary-El *v.* 843
Xheka *v.* United States 993
Yalkowsky *v.* Mollen 939
Yalkowsky *v.* Neale 916
Yalkowsky *v.* Shedler 916
Yankee Milk, Inc.; Fairdale Farms, Inc. *v.* 1043
Yavapai-Prescott Indian Tribe *v.* Clark 1017
Yeager *v.* Wilkinson 861
Yee *v.* Yee 829,1003
Yelverton *v.* Blue Bell, Inc. 998
Yermian; United States *v.* 991,1036
Young; Arizona *v.* 866
Young; Callahan *v.* 863
Young *v.* Georgia 1057
Young; Heat & Frost Insulators *v.* 981
Young-Buffalo *v.* United States 1071
Young & Co.; United States *v.* 888
Yount; Patton *v.* 913,980
Yu *v.* California 1072
Zack Metal Co. *v.* London Steamship Mut. Ins. Assn., Ltd. 894
Zahrte; Sturm, Ruger & Co. *v.* 961
Zaitchick; American Motorists Ins. Co. *v.* 851
Zang *v.* United States 828
Zant; O'Dillon *v.* 834
Zapata; Director of Cal. Dept. of Social Services *v.* 827
Zazueta-Lopez *v.* United States 983
Zboinski *v.* Illinois 917
Zeanah; Alexander *v.* 861,978
Zerilli *v.* United States 861
Zerman *v.* Jacobs 859,963
Zimmerman; Continental Airlines, Inc. *v.* 1038
Zimmerman; Davenport *v.* 854
Zimmerman; Hill *v.* 940
Zimmerman; Johnson *v.* 899
Zimmerman; Leonard *v.* 857
Zimmerman; Morgan *v.* 985
Zimmerman; Nickol *v.* 874
Zinman *v.* United States 896
Zirpolo *v.* United States 822
Zuniga *v.* United States 983
Zylstra *v.* United States 965

TABLE OF CASES CITED

Page

A. B. Small Co. v. American Sugar Refining Co., 267 U.S. 233 970
Acampora v. Birkland, 220 F. Supp. 527 540
Adams v. Texas, 448 U.S. 38 905, 908
Adams v. United States ex rel. McCann, 317 U.S. 269 124
Adkins v. E. I. DuPont de Nemours & Co., 335 U.S. 331 930
Air Transport Assn. of America v. New York State Dept. of Taxation and Finance, 91 App. Div. 2d 169 14
Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 971, 972
Albemarle Paper Co. v. Moody, 422 U.S. 405 225
Alexander v. Gardner-Denver Co., 415 U.S. 36 903, 904
Alexander v. United States Dept. of HUD, 441 U.S. 39 36
Allee v. Medrano, 416 U.S. 802 74
Allegheny Airlines, Inc. v. City of Philadelphia, 453 Pa. 181 14
Allen v. McCurry, 449 U.S. 90 158, 171, 176, 177
American Ship Building Co. v. NLRB, 380 U.S. 300 97, 108
American Textile Mfrs. Institute, Inc. v. Donovan, 452 U.S. 490 359
American Tobacco Co. v. Patterson, 456 U.S. 63 189
Andrade v. City of Phoenix, 692 F. 2d 557 965
Andrews v. Drew Municipal Separate School Dist., 507 F. 2d 611 965
Andrus v. Shell Oil Co., 446 U.S. 657 375

Page

Arizona v. California, 373 U.S. 546 24
Arizona Dept. of Revenue v. Cochise Airlines, 128 Ariz. 432 14
Arizona Public Service Co. v. Snead, 441 U.S. 141 14
Arlington County v. United States, 669 F. 2d 925 247
Arnett v. Kennedy, 416 U.S. 134 972
Arriaga-Ramirez v. United States, 325 F. 2d 857 922
Autry v. Estelle, 464 U.S. 1301 51, 57, 62
Autry v. State, 626 S. W. 2d 758 2, 3
Axelson, Inc. v. NLRB, 599 F. 2d 91 107
Baldwin v. Maggio, 463 U.S. 1251 51
Baldwin v. Maggio, 704 F. 2d 1325 59
Barclay v. Florida, 463 U.S. 939 61, 80, 86–88
Barefoot v. Estelle, 463 U.S. 880 3, 48, 55, 64, 1307
Baron v. Meloni, 556 F. Supp. 796 966
Barsky v. Board of Regents, 347 U.S. 442 970
Batterton v. Francis, 432 U.S. 416 98
Beed v. State, 271 Ark. 526 871
Bell v. New Jersey, 461 U.S. 773 375
Bennett v. Commissioner, 30 T. C. 114 401, 404
Benny v. Loew's Inc., 239 F. 2d 532 476
Benton v. Maryland, 395 U.S. 784 1057
Bingler v. Johnson, 394 U.S. 741 228

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Page
Blackwell v. State, 248 Ga. 138 871
Blasingame v. Estelle, 604 F. 2d 893 1022
Block v. Hirsh, 256 U.S. 135 878
Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 158, 159
Bobbs-Merrill Co. v. Straus, 210 U.S. 339 432, 439, 491
Bob Jones Univ. v. United States, 461 U.S. 574 375
Bowles v. Willingham, 321 U.S. 503 878
Box v. Swindle, 306 F. 2d 882 554
Branzburg v. Hayes, 408 U.S. 665 519
Brewer v. Williams, 430 U.S. 387 1022
Briggs v. North Muskegon Police Dept., 563 F. Supp. 585 966
Britton v. United States, 532 F. Supp. 275 391
Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 500
Brown v. Bullock, 194 F. Supp. 207 540
Brown v. Ohio, 432 U.S. 161 84
Brown v. United States, 411 U.S. 223 553
Bruton v. United States, 391 U.S. 123 553
Bruzzone v. Miller Brewing Co., 202 USPQ 809 492
Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191 486, 488
Bullington v. Missouri, 451 U.S. 430 1059, 1061–1063
Bumper v. North Carolina, 391 U.S. 543 65, 382
Bunker Hill Company Lead & Zinc Smelter v. EPA, 658 F. 2d 1280 174, 178
Burks v. Lasker, 441 U.S. 471 532, 535, 536, 538, 540, 541, 545, 546
Burks v. United States, 437 U.S. 1 1061, 1062
Page
Burstyn, Inc. v. Wilson, 343 U.S. 495 969
Butler v. South Carolina, 459 U.S. 932 1025
Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 247
Califano v. Sanders, 430 U.S. 99 881
Califano v. Yamasaki, 442 U.S. 682 160, 881
California v. Grace Brethren Church, 457 U.S. 393 247
California v. Watt, 683 F. 2d 1253 1304
Callanan v. United States, 364 U.S. 587 29
Camara v. Municipal Court, 387 U.S. 523 291, 294, 308, 309, 414, 415
Canal Co. v. Clark, 13 Wall. 311 439
Cannon v. University of Chicago, 441 U.S. 677 536
Cantwell v. Connecticut, 310 U.S. 296 969
Carbice Corp. v. American Patents Corp., 283 U.S. 27 490
Carey v. Population Services International, 431 U.S. 678 971
Cary v. Longman, 1 East 358 480
Chapman v. California, 386 U.S. 18 120, 123, 124, 128, 129, 141, 142
Chapman v. Houston Welfare Rights Org., 441 U.S. 600 36
Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 97
City. See name of city.
Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632 971
Cohen v. Beneficial Loan Corp., 337 U.S. 541 528
Coleman v. Alabama, 399 U.S. 1 129
Coleman v. State, 378 So. 2d 640 868, 871
Colonnade Corp. v. United States, 397 U.S. 72 292
Colony, Inc. v. Commissioner, 357 U.S. 28 403

Page
Columbia Pictures Corp. v. National Broadcasting Co., 137 F. Supp. 348 476
Commissioner v. Lane-Wells Co., 321 U.S. 219 402
Commissioner v. South Texas Lumber Co., 333 U.S. 496 228
Commissioner v. Sunnen, 333 U.S. 591 172, 180
Commissioner of Internal Revenue. See Commissioner.
Commonwealth. See also name of Commonwealth.
Commonwealth v. Henderson, 497 Pa. 23 871
Commonwealth v. Soares, 377 Mass. 461 870
Community Television of Southern California v. Gottfried, 459 U.S. 498 454
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 14
Connally v. General Construction Co., 269 U.S. 385 969
Construction Workers v. Laburnum Corp., 347 U.S. 656 251
Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 20, 223
Cook's Trial, 4 Har. St. Tr. 737 506
Coolidge v. New Hampshire, 403 U.S. 443 294
Corbus v. Alaska Treadwell Gold Mining Co., 187 U.S. 455 529, 532, 533
Cort v. Ash, 422 U.S. 66 536, 541
County. See name of county.
Cox v. New Hampshire, 312 U.S. 569 511
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 920
Craig v. Harney, 331 U.S. 367 514
Cupp v. Naughten, 414 U.S. 141 952
Cuyler v. Sullivan, 446 U.S. 335 129
Davis v. Alaska, 415 U.S. 308 952, 955
Davis v. Georgia, 429 U.S. 122 908

Page
Davis v. Jacobs, 454 U.S. 911 931
Davis v. Wood, 1 Wheat. 6 902
Dawson Chemical Co. v. Rohm & Hass Co., 448 U.S. 176 441, 491
Deep South Packing Co. v. Laitram Corp., 406 U.S. 518 432, 456
DeFunis v. Odegaard, 416 U.S. 312 70, 74
Delaware & Hudson Co. v. Albany & Susquehanna R. Co., 213 U.S. 435 529, 531, 544
Dellar v. Samuel Goldwyn, Inc., 104 F. 2d 661 475
Derfel v. Commissioner, 44 TCM 45 391
De Santa v. Nehi Corp., 171 F. 2d 696 554
Deutsch v. Arnold, 98 F. 2d 686 437
Dickerson v. New Banner Institute, Inc., 460 U.S. 103 20
Di Pasquale v. Karnuth, 158 F. 2d 878 197
Division of Military & Naval Affairs v. FLRA, 683 F. 2d 45 91
Dodge v. Woolsey, 18 How. 331 529
Doepel v. United States, 434 A. 2d 449 871
Domaingue v. Butterworth, 641 F. 2d 8 1055
Donnelly v. DeChristoforo, 416 U.S. 637 49, 952
Donovan v. Dewey, 452 U.S. 594 292, 299
Douglas v. Commissioner, 322 U.S. 275 210, 225
Douglas Aircraft Co. v. NLRB, 609 F. 2d 352 947
Dowell v. Commissioner, 614 F. 2d 1263 391, 393, 395
Dowell v. Commissioner, 68 T. C. 646 390
Downum v. United States, 372 U.S. 734 509
Drake v. Covington County Bd. of Ed., 371 F. Supp. 974 966
Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., 36 F. 2d 354 437, 488

Page

Drew v. State, 588 S. W. 2d 562 871

Duckworth v. Serrano, 454 U.S. 1 1054

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 252, 279

Duncan v. Louisiana, 391 U.S. 145 869

Dunn v. Perrin, 570 F. 2d 21 1025, 1026

Du Pont de Nemours & Co. v. Davis, 264 U.S. 456 391, 398

Du Pont de Nemours & Co. v. Train, 430 U.S. 112 160

Durfee v. Duke, 375 U.S. 106 943

Dutton v. Evans, 400 U.S. 74 247

Eastern Microwave, Inc. v. Doubleday Sports, Inc., 691 F. 2d 125 430

Eddings v. Oklahoma, 455 U.S. 104 920

Edison v. Lubin, 122 F. 240 474

E. I. du Pont de Nemours & Co. v. Davis, 264 U.S. 456 391, 398

E. I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 160

Eisenstadt v. Baird, 405 U.S. 438 971

Electrical Workers v. Foust, 442 U.S. 42 255

Elliott Liroff v. Commissioner, 44 TCM 43 391

Encyclopaedia Britannica Educational Corp. v. Crooks, 542 F. Supp. 1156 485

Engle v. Isaac, 456 U.S. 107 83

Espinoza v. Commissioner, 78 T. C. 412 391

Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., 405 U.S. 707 9

Exploration Co. v. United States, 247 U.S. 435 402

Fairfax's Devisee v. Hunter's Lessee, 7 Cranch 603 35

Famous Music Corp. v. Bay State Harness Horse Racing & Breeding Assn., Inc., 554 F. 2d 1213 437, 488

Faretta v. California, 422 U.S. 806 139, 1022

Page

Fay v. Noia, 372 U.S. 391 55, 124

FBI v. Abramson, 456 U.S. 615 357

FCC v. Pottsville Broadcasting Co., 309 U.S. 134 98

FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27 98

FEA v. Algonquin SNG, Inc., 426 U.S. 548 204

Fidalgo/Velez v. INS, 697 F. 2d 1026 194

Fidelity Federal Savings & Loan Assn. v. De la Cuesta, 458 U.S. 141 248, 278, 281

Fields v. Wyrick, 682 F. 2d 154 1021

Fillippon v. Albion Vein Slate Co., 250 U.S. 76 119

Finnegan v. Matthews, 641 F. 2d 1340 879, 885

Fisher v. Snyder, 476 F. 2d 375 965

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 248

Florida National Guard v. FLRA, 699 F. 2d 1082 91

Florsheim Bros. Co. v. United States, 280 U.S. 453 402

Flowers v. State, 402 So. 2d 1088 871

Flynn v. City of Cambridge, 383 Mass. 152 875

Flynt v. Ohio, 451 U.S. 619 919

Folsom v. Marsh, 9 F. Cas. 342 475

Ford Motor Co. v. NLRB, 441 U.S. 488 97

Fornaris v. Ridge Tool Co., 400 U.S. 41 247

Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 430, 431, 463, 469, 500

Fox v. Reich & Tang, Inc., 94 F. R. D. 94 527

Fox Film Corp. v. Doyal, 286 U.S. 123 432, 439, 477, 480

Frazier v. State, 117 Tenn. 430 1026

Free v. Bland, 369 U.S. 663 281

Page

Fulman v. United States, 434 U.S. 528 228

Furman v. Georgia, 408 U.S. 238 1031

Gaines v. State, 404 So. 2d 557 868, 871, 872

Galfand v. Chestnutt Corp., 545 F. 2d 807 536

Galvin v. Commissioner, 45 TCM 221 391

Gannett Co. v. DePasquale, 443 U.S. 368 514, 516, 517

Garner v. Louisiana, 368 U.S. 157 84

Geders v. United States, 425 U.S. 80 129

General Building Contractors Assn., Inc. v. Pennsylvania, 458 U.S. 375 108

General Electric Co. v. Gilbert, 429 U.S. 125 98

General Telephone Co. v. EEOC, 446 U.S. 318 903, 904

George M. Still, Inc. v. Commissioner, 19 T. C. 1072 394

Germantown Trust Co. v. Commissioner, 309 U.S. 304 403

Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F. 2d 1159 438, 487, 488

Gertz v. Robert Welch, Inc., 418 U.S. 323 260

Giaccio v. Pennsylvania, 382 U.S. 399 969

Gibson v. Berryhill, 411 U.S. 564 944

Gideon v. Wainwright, 372 U.S. 335 118, 129

Glass v. Commissioner, 76 T. C. 949 213

Glasser v. United States, 315 U.S. 60 129

Globe Newspaper Co. v. Superior Court, 457 U.S. 596 509, 514, 517, 520

Godfrey v. State, 248 Ga. 616 1062

Golden v. Zwickler, 394 U.S. 103 71

Goldring v. Commissioner, 20 T. C. 79 394, 405

Page

Goode v. Florida, 441 U.S. 967 81

Goode v. State, 365 So. 2d 381 81, 86

Government of Virgin Islands v. Dowling, 633 F. 2d 660 949

Grace & Co. v. Rubber Workers, 461 U.S. 757 904

Gray v. Sanders, 372 U.S. 368 74

Grayned v. City of Rockford, 408 U.S. 104 969

Gregg v. Georgia, 428 U.S. 153 3, 56, 58, 60, 61, 87, 113, 866, 867, 905, 908, 920, 923, 956, 978, 987, 1002, 1003, 1012, 1023, 1027, 1031, 1032, 1063, 1065, 1074

Gregory-Portland Independent School Dist. v. United States, 448 U.S. 1342 885

Grigsby v. Mabry, 569 F. Supp. 1273 65, 382

Griswold v. Connecticut, 381 U.S. 479 971

Groppi v. Leslie, 436 F. 2d 331 6

Grossman v. Johnson, 674 F. 2d 115 525

Gryger v. Burke, 334 U.S. 728 86

Ham v. South Carolina, 409 U.S. 524 522

Hanna v. Plumer, 380 U.S. 460 544

Hanson v. Denckla, 357 U.S. 235 247

Harrington v. California, 395 U.S. 250 124

Harris v. Rivera, 454 U.S. 339 62

Harrison's Trial, 2 Har. St. Tr. 308 506

Hawes v. Oakland, 104 U.S. 450 528–532, 543, 544

Heitland v. INS, 551 F. 2d 495 194

Helvering v. Hammel, 311 U.S. 504 198

Helvering v. Morgan's Inc., 293 U.S. 121 223

Helvering v. Twin Bell Oil Syndicate, 293 U.S. 312 211, 226

Henry v. A. B. Dick Co., 224 U.S. 1 441, 490

Page

Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297 36
Herman & MacLean v. Huddleston, 459 U.S. 375 541
Herring v. Commissioner, 293 U.S. 322 210, 224, 225, 229, 232, 233–236
Herring v. New York, 422 U.S. 853 129, 139
Hill v. Whalen & Martell, Inc., 220 F. 359 476
Hillsboro National Bank v. Commissioner, 460 U.S. 370 393
Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 946
Hines v. Davidowitz, 312 U.S. 52 248, 281
Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 970
Hollenbaugh v. Carnegie Free Library, 436 F. Supp. 1328 966
Hopper v. Evans, 456 U.S. 605 49
Houchins v. KQED, Inc., 438 U.S. 1 518
Houston v. Commissioner, 38 T. C. 486 394, 405
Hovey v. Superior Court, 28 Cal. 3d 1 511, 515
Huffman v. Pursue, Ltd., 420 U.S. 592 944
Hughes v. State, 420 So. 2d 1060 872
Hurtado v. California, 110 U.S. 516 969
Hutchins v. Garrison, 724 F. 2d 1425 378
Hutto v. Davis, 454 U.S. 370 61
Illinois v. Allen, 397 U.S. 337 129
INS v. Hibi, 414 U.S. 5 157, 159
INS v. Jong Ha Wang, 450 U.S. 139 188, 190, 194, 195
In re. See name of party or proceedings.
Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxite de Guinee, 456 U.S. 694 944
International Business Machines Corp. v. United States, 298 U.S. 131 432

Page

Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844 439, 489
Iowa State Univ. Research Foundation, Inc. v. American Broadcasting Cos., 621 F. 2d 57 484, 485
Iron Arrow Honor Society v. Califano, 597 F. 2d 590 69
Iron Arrow Honor Society v. Hustedler, 499 F. Supp. 496 69, 71
Iron Arrow Honor Society v. Schweiker, 458 U.S. 1102; 652 F. 2d 445 69
Irvin v. Dowd, 366 U.S. 717 138, 975, 977
Irving v. State, 228 So. 2d 266 872
Jago v. Van Curen, 454 U.S. 14 21
James v. Louisiana, 464 U.S. 908 51
Jay v. Boyd, 351 U.S. 345 192
Jefferson County Pharmaceutical Assn. v. Abbott Laboratories, 460 U.S. 150 26
Johnson v. Hill, 274 F. 2d 110 550
Johnson v. Zerbst, 304 U.S. 458 129, 1023
Jordan v. Massachusetts, 225 U.S. 167 975
Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 969
Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 970
Jurek v. Texas, 428 U.S. 262 58
Kalb v. Feuerstein, 308 U.S. 433 943, 944
Kalem Co. v. Harper Brothers, 222 U.S. 55 435–437, 486, 491
Kaltreider Construction, Inc. v. United States, 303 F. 2d 366 394
Kamheangpatiyooth v. INS, 597 F. 2d 1253 187, 188, 192
Katz v. United States, 389 U.S. 347 292
Keaton v. Atchison, T. & S. F. R. Co., 321 F. 2d 317 554
KECA Music, Inc. v. Dingus McGee's Co., 432 F. Supp. 72 437, 488

Page

Keeton v. Garrison, 578 F. Supp. 1164 382
Kelley v. Johnson, 425 U.S. 238 972
Klemp v. Commissioner, 77 T. C. 201 389, 390, 391, 395, 406
Kolender v. Lawson, 461 U.S. 352 969, 970
Koster v. Lumbermens Mut. Casualty Co., 330 U.S. 518 529
Kotteakos v. United States, 328 U.S. 750 553, 554
Kramer v. Commissioner, 44 TCM 42 391
Kuehner v. Schweiker, No. 82–1514 (CA3 Sept. 19, 1983) 887
Laird v. State, 251 Ark. 1074 1026
Landon v. Plasencia, 459 U.S. 21 193
Lawrence v. Dana, 15 F. Cas. 26 475
Lawrence v. State, 51 Md. App. 575 871
Lee v. State, 637 P. 2d 879 871
Lewis v. United States, 445 U.S. 55 20, 204
Lindsey v. Louisiana, 464 U.S. 908 51
Liroff v. Commissioner, 44 TCM 43; 44 TCM 47 391
Lisenda v. California, 314 U.S. 219 952, 955
Llewellyn v. Queen City Dairy, Inc., 187 Md. 49 534
Lockett v. Ohio, 438 U.S. 586 920
Logan v. Zimmerman Brush Co., 455 U.S. 422 21
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 877, 878
Lorillard v. Pons, 434 U.S. 575 200, 225
Los Angeles v. Lyons, 461 U.S. 95 74
Los Angeles County v. Davis, 440 U.S. 625 73
Loving v. Virginia, 338 U.S. 1 971
Lucas v. Pilliod Lumber Co., 281 U.S. 245 391
Lucia v. United States, 474 F. 2d 565 392

Page

Lutwak v. United States, 344 U.S. 604 553
Maggio v. Williams, 464 U.S. 56 88
Major v. Hampton, 413 F. Supp. 66 966
Malone v. White Motors Corp., 435 U.S. 497 247
Marshall v. Barlow's, Inc., 436 U.S. 307 291, 299, 302, 412, 414
Marshall v. Lonberger, 459 U.S. 422 120, 122, 132, 142
Massachusetts v. United States, 435 U.S. 444 9
Massiah v. United States, 377 U.S. 201 129
Mastro Plastics Corp. v. NLRB, 350 U.S. 270 225
Mathews v. Diaz, 426 U.S. 67 881, 883, 886
Mathews v. Eldridge, 424 U.S. 319 882, 883, 886
Mathews Conveyer Co. v. Palmer-Bee Co., 135 F. 2d 73 476
Mattox v. United States, 146 U.S. 140 121, 136
Mazer v. Stein, 347 U.S. 201 439, 477
McColvin v. INS, 648 F. 2d 935 189, 194
McCoy v. Goldston, 652 F. 2d 654 558
McCray v. New York, 461 U.S. 961 867, 869, 870, 873
McGautha v. California, 402 U.S. 183 969
McLean v. Fleming, 96 U.S. 245 439
McLeod v. Peterson, 283 F. 2d 180 200
McLucas v. DeChamplain, 421 U.S. 21 248
Meehan v. Macy, 129 U.S. App. D. C. 217 966
Meeropol v. Nizer, 560 F. 2d 1061 475, 484
Meiselman v. Eberstadt, 39 Del. Ch. 563 540
Mercantile National Bank v. Langdeau, 371 U.S. 555 359

Page

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 200, 536, 541

Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 74

Meyer v. Nebraska, 262 U.S. 390 971

Michigan v. Tyler, 436 U.S. 499 289, 291–294, 296–301, 305–307, 309, 310

Middlesex County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1 536, 541

Midstate Tel. Corp. v. NLRB, 706 F. 2d 401 107

Miller v. California, 413 U.S. 15 919

Miller v. Illinois, 461 U.S. 961 867

Miller v. State, 373 So. 2d 882 82

Mindel v. U. S. Civil Service Comm'n, 312 F. Supp. 485 966

Minnesota v. Hoffman, 543 F. 2d 1198 247

Miranda v. Arizona, 384 U.S. 436 1021–1023

Mississippi Publishing Corp. v. Murphree, 326 U.S. 438 544

Montana v. United States, 440 U.S. 147 158, 159, 162–164, 168–172, 174–176

Montgomery Ward & Co. v. Duncan, 311 U.S. 243 556

Moore v. City of East Cleveland, 431 U.S. 494 971

Moore v. Illinois, 434 U.S. 220 129

Moore v. Wolff, 495 F. 2d 35 1022

Morris v. Slappy, 461 U.S. 1 509

Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 442, 490

Murphy v. Hunt, 455 U.S. 478 73

M. Witmark & Sons v. Tremont Social & Athletic Club, 188 F. Supp. 787 488

Narcisse v. Louisiana, 464 U.S. 865 51

NLRB v. Brown, 380 U.S. 278 97

NLRB v. Erie Resistor Corp., 373 U.S. 221 97

Page

NLRB v. Insurance Agents, 361 U.S. 477 108

NLRB v. International Brotherhood of Electrical Workers, Local 73 (Chewelah Contractors, Inc.), 621 F. 2d 1035 951

NLRB v. Iron Workers, 434 U.S. 335 97

NLRB v. Lion Oil Co., 352 U.S. 282 217

NLRB v. Pincus Brothers, Inc.-Maxwell, 620 F. 2d 367 947

NLRB v. Truck Drivers, 353 U.S. 87 97

National Muffler Dealers Assn., Inc. v. United States, 440 U.S. 472 224, 236

National Paper Products Co. v. Helvering, 293 U.S. 183 394

Naturalization of 68 Filipino War Veterans, In re, 406 F. Supp. 931 157, 161, 162

Neblett v. Carpenter, 305 U.S. 297 970

Nebraska Press Assn. v. Stuart, 427 U.S. 539 516

Neil v. State, 433 So. 2d 51 871

Nesmith v. Commissioner, 699 F. 2d 712 391

Nevada v. United States, 463 U.S. 110 163

New Orleans Gas Light Co. v. Drainage Comm'n of New Orleans, 197 U.S. 453 35

New State Ice Co. v. Liebmann, 285 U.S. 262 869

New York v. Ferber, 458 U.S. 747 919

New York Times Co. v. Roxbury Data Interface, Inc., 434 F. Supp. 217 496

Nixon v. Administrator of General Services, 433 U.S. 425 514

Norfolk Redevelopment & Housing Authority v. Chesapeake & Potomac Tel. Co., 464 U.S. 30 403

North American Oil Consolidated v. Burnet, 286 U.S. 417 227

Page
Northern States Power Co. v. Minnesota, 447 F. 2d 1143 282
North Haven Bd. of Ed. v. Bell, 456 U.S. 512 23, 69
Norton v. Macy, 135 U.S. App. D. C. 214 966
Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 414, 415
Olegario v. United States, 629 F. 2d 204 157
O'Rourke v. Levine, 80 S. Ct. 623 885
Owens v. Commonwealth, 186 Va. 689 1026
Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190 241, 248–250, 257, 258, 260, 261, 263, 264, 267, 274, 275, 278, 279, 281, 286
Palmer v. Bender, 287 U.S. 551 210
Paris Adult Theatre I v. Slaton, 413 U.S. 49 919
Parker v. Levy, 417 U.S. 733 970, 972
Parklane Hosiery Co. v. Shore, 439 U.S. 322 157–159, 172, 902
Patti v. Schweiker, 669 F. 2d 582 879, 885
Payton v. New York, 445 U.S. 573 297
Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 357
People v. Jones, 94 Ill. 2d 275 921
People v. McCray, 57 N. Y. 2d 542 871
People v. Wheeler, 22 Cal. 3d 258 870
People v. Williams, 97 Ill. 2d 252 871
Perry v. Louisiana, 461 U.S. 961 867
Perry v. Sindermann, 408 U.S. 593 21
Perry Ed. Assn. v. Perry Local Educator's Assn., 460 U.S. 37 247

Page
Peter Cook's Trial, 4 Har. St. Tr. 737 506
Peters v. Kiff, 407 U.S. 493 976
Pettine v. Territory of New Mexico, 201 F. 489 1026
Philbrook v. Glodgett, 421 U.S. 707 357
Phillips v. Bergland, 586 F. 2d 1007 966
Picard v. Connor, 404 U.S. 270 1054, 1055
Pierce v. Society of Sisters, 268 U.S. 510 971
Plunkett v. Commissioner, 465 F. 2d 299 394
Potomac Electric Power Co. v. Fugate, 211 Va. 745 42
Powell v. Alabama, 287 U.S. 45 129
Powell v. McCormack, 395 U.S. 486 73
Power Reactor Co. v. Electricians, 367 U.S. 396 265
Price v. Gurney, 324 U.S. 100 529
Prince v. Massachusetts, 321 U.S. 158 971
Proffitt v. Florida, 428 U.S. 242 58
Public Service Comm'n v. Wycoff Co., 344 U.S. 237 71
Pulley v. Harris, 460 U.S. 1036 51, 57–59, 61–63, 65, 66
Quern v. Mandley, 436 U.S. 725 76
Railway Express Agency, Inc. v. Virginia, 347 U.S. 359; 358 U.S. 434 14
Raley v. Ohio, 360 U.S. 423 969, 970
Reeves, Inc. v. Stake, 447 U.S. 429 76
Reiter v. Sonotone Corp., 442 U.S. 330 189
Remmer v. United States, 347 U.S. 227 120
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 12, 248
Richard B. Liroff v. Commissioner, 44 TCM 47 391
Richards v. United States, 369 U.S. 1 21, 189
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 505, 506, 508, 509, 511, 514, 517, 520

Page

Roadway Express, Inc. v. NLRB, 647 F. 2d 415 947
Robert C. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297 36
Roe v. Wade, 410 U.S. 113 971
Rogers v. United States, 422 U.S. 35 118–120
Rose v. Lundy, 455 U.S. 509 55, 56, 124, 1055, 1056
Rosenberg v. Fleuti, 374 U.S. 449 187, 192–194, 196, 204
Rosenberg v. United States, 346 U.S. 273 880
Ross v. Bernhard, 396 U.S. 531 528
Ross v. Hopper, 716 F. 2d 1528 111, 112
Ross v. Hopper, 538 F. Supp. 105 1031
Rostker v. Goldberg, 448 U.S. 1306 885
Rothensies v. Electric Storage Battery Co., 329 U.S. 296 406
Ryder v. State, 100 Ga. 528 514
St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 72, 76
Sanders v. United States, 373 U.S. 1 55, 64, 1029, 1033, 1303
San Diego Building Trades Council v. Garmon, 359 U.S. 236 249, 275
Santosky v. Kramer, 455 U.S. 745 971
Saxbe v. Washington Post Co., 417 U.S. 843 517
Saxe v. Brady, 40 Del. Ch. 474 540
Sayre v. Moore, 1 East 361 n(b) 480
Schnapper v. Foley, 215 U.S. App. D. C. 59 443
Scott v. Macy, 121 U.S. App. D. C. 205 965
Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc., 256 F. Supp. 399 438, 488, 489
Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 970
Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 902

Page

See v. City of Seattle, 387 U.S. 541 291, 307–309, 414, 415
Shamrock Oil & Gas Corp. v. Commissioner, 35 T. C. 979 218
Shapiro, Bernstein & Co. v. Goody, 248 F. 2d 260 472
Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F. 2d 304 437, 488
Shapiro, Bernstein & Co. v. P. F. Collier & Son Co., 26 USPQ 40 476
Shapiro, Bernstein & Co. v. Veltin, 47 F. Supp. 648 488
Shaw v. Railroad Co., 101 U.S. 557 36
Shields v. United States, 273 U.S. 583 119
Shinall v. State, 199 So. 2d 251 872
Shuman v. City of Philadelphia, 470 F. Supp. 449 966
Sibbach v. Wilson & Co., 312 U.S. 1 544
Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 70
Skidmore v. Swift & Co., 323 U.S. 134 98
Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 971
Small Co. v. American Sugar Refining Co., 267 U.S. 233 970
Smiley v. State, 294 Md. 461 919
Smith v. Goguen, 415 U.S. 566 970
Smith v. Maryland, 442 U.S. 735 292
Smith v. Phillips, 455 U.S. 209 84, 118–121, 140–143, 150, 152, 554, 557, 558, 976
Smith v. Price, 446 F. Supp. 828 966
Smith v. Wade, 461 U.S. 30 260
Snyder v. Massachusetts, 291 U.S. 97 118, 130, 139
Sonnier v. Louisiana, 463 U.S. 1229 51
Southeastern Community College v. Davis, 442 U.S. 397 223

Page

Spencer v. Zant, 715 F. 2d 1562 111–113, 1028, 1029, 1031, 1033
Sprouce v. Commonwealth, 2 Va. Cas. 375 514
Standefer v. United States, 447 U.S. 10 159, 178
Stanley v. Georgia, 394 U.S. 557 971
State. See also name of State.
State v. Adams, 277 S. C. 115 1023
State v. Battle, 661 S. W. 2d 487 1306
State v. Butler, 277 S. C. 452 1025
State v. Copeland, 278 S. C. 572 1025
State v. Crespin, 94 N. M. 486 871
State v. Davis, 482 S. W. 2d 486 1026
State v. Derrico, 181 Conn. 151 1026
State v. Fields, 538 S. W. 2d 348 1021
State v. Gilmore, 650 S. W. 2d 627 1306
State v. Grady, 93 Wis. 2d 1 871
State v. James, 431 So. 2d 399 55
State v. Johnson, 616 S. W. 2d 846 871
State v. Jones, 408 So. 2d 1285 871
State v. Laws, 661 S. W. 2d 526 1306
State v. Lynch, 300 N. C. 534 871
State v. McDonald, 89 Wash. 2d 256 1026
State v. McDonald, 661 S. W. 2d 497 1306
State v. Moore, 432 So. 2d 209 59
State v. Narcisse, 426 So. 2d 118 59
State v. Osbey, 213 Kan. 564 1026
State v. Prejean, 379 So. 2d 240 58
State v. Sonnier, 379 So. 2d 1336 60
State v. Stewart, 225 Kan. 410 871
State v. Thompson, 276 S. C. 616 871
State v. Ucero, 450 A. 2d 809 871
State v. Walker, 55 Ohio St. 2d 208 951, 952, 954

Page

State v. Williams, 383 So. 2d 369 47, 55, 58
State ex rel. Arizona Dept. of Revenue v. Cochise Airlines, 128 Ariz. 432 14
State ex rel. Williams v. Blackburn, 396 So. 2d 1249 49
Stauffer Chemical Co. v. EPA, 647 F. 2d 1075 168–170, 172, 173, 178, 181
Stephens v. Georgia, 429 U.S. 986 1028
Stephens v. Hopper, 439 U.S. 991 1028
Stephens v. Zant, 454 U.S. 1035 1028
Stephens v. Zant, 631 F. 2d 397 1030
Still, Inc. v. Commissioner, 19 T. C. 1072 394
Stirparo v. State, 287 A. 2d 394 1026
Stone v. Powell, 428 U.S. 465 124
Strickland v. Washington, 462 U.S. 1105 51
Suddarth v. Slane, 539 F. Supp. 612 966
Sullivan v. Askew, 348 So. 2d 312 110
Sullivan v. Fogg, 613 F. 2d 465 975
Sullivan v. State, 303 So. 2d 632 109
Sullivan v. State, 372 So. 2d 938 110
Sullivan v. Wainwright, 464 U.S. 109 1031, 1032
Sullivan v. Wainwright, 695 F. 2d 1306 110
Sumner v. Mata, 449 U.S. 539 85, 120, 132, 150
Sunshine Coal Co. v. Adkins, 310 U.S. 381 359
Swain v. Alabama, 380 U.S. 202 868–871, 873
Swope v. Bratton, 541 F. Supp. 99 966
Taylor v. Kentucky, 436 U.S. 478 1026
Taylor v. Louisiana, 419 U.S. 522 869

Page

Taylor v. U. S. Civil Service Comm'n, 374 F. 2d 466 966

Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394 430, 431, 469

Tennessee Fabricating Co. v. Moultrie Mfg. Co., 421 F. 2d 279 476

TVA v. Hill, 437 U.S. 153 398

Territory. See name of Territory.

Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 36

Thompson v. Hubbard, 131 U.S. 123 431

Thor Power Tool Co. v. Commissioner, 439 U.S. 522 228

Times-Picayune Publishing Corp. v. Schulingkamp, 419 U.S. 1301 48

Tipton v. Socony Mobil Oil Co., 375 U.S. 34 554

Townsend v. Sain, 372 U.S. 293 55, 113

Trade-Mark Cases, The, 100 U.S. 82 439

Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F. 2d 1171 475, 478

Tumey v. Ohio, 273 U.S. 510 130

Turner v. Louisiana, 379 U.S. 466 138

Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 432, 447, 469, 477, 486–488, 500

United Copper Securities Co. v. Amalgamated Copper Co., 244 U.S. 261 532, 544

United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90 439

United States v. Alvarez-Porras, 643 F. 2d 54 949

United States v. Andrews, 585 F. 2d 961 949

United States v. Barnes, 604 F. 2d 121 514

United States v. Bell, 573 F. 2d 1040 949

United States v. Biswell, 406 U.S. 311 292

Page

United States v. Borden Co., 347 U.S. 514 554

United States v. Bowles, 331 F. 2d 742 922

United States v. California, 381 U.S. 139 315

United States v. Cartwright, 411 U.S. 546 224, 226, 237

United States v. Cassity, 631 F. 2d 461 948

United States v. Clark, 445 U.S. 23 26

United States v. Correll, 389 U.S. 299 224, 227

United States v. Cronic, 459 U.S. 1199 51

United States v. De La Cruz-Sepulveda, 656 F. 2d 1129 922

United States v. Flannery, 451 F. 2d 880 1025

United States v. General Motors Corp., 323 U.S. 373 878

United States v. Gordon, 638 F. 2d 886 26

United States v. Green, 474 F. 2d 1385 308

United States v. Gresko, 632 F. 2d 1128 949

United States v. Habig, 390 U.S. 222 394

United States v. Harriss, 347 U.S. 612 359

United States v. Hasting, 461 U.S. 499 509

United States v. Henry, 447 U.S. 264 129, 1022

United States v. Jackson, 201 U.S. App. D. C. 212 949

United States v. James, 590 F. 2d 575 949

United States v. Jorn, 400 U.S. 470 509

United States v. Katz, 271 U.S. 354 198

United States v. Kirby, 7 Wall. 482 198

United States v. LaSalle National Bank, 437 U.S. 298 399

United States v. Maine, 420 U.S. 515 346

Page

United States v. Martino, 648 F. 2d 367 18
United States v. Marubeni America Corp., 611 F. 2d 763 18, 22, 25, 26, 29
United States v. Massimo, 432 F. 2d 324 1022
United States v. McManigal, 708 F. 2d 276 18, 22, 29
United States v. Mendoza, 464 U.S. 154 169, 171, 173, 177, 179
United States v. Meyers, 432 F. Supp. 456 22, 26, 29
United States v. Miller, 317 U.S. 369 36
United States v. Miranda-Uriarte, 649 F. 2d 1345 949
United States v. Mohabir, 624 F. 2d 1140 1022, 1023
United States v. Monaco, 702 F. 2d 860 949
United States v. Morrison, 449 U.S. 361 118, 120, 129, 139
United States v. Morton Salt Co., 338 U.S. 632 415
United States v. Moser, 266 U.S. 236 163, 164, 170–172, 177, 181
United States v. Munsingwear, Inc., 340 U.S. 36 73
United States v. Naftalin, 441 U.S. 768 23
United States v. Nardi, 633 F. 2d 972 949
United States v. Nixon, 418 U.S. 683 949
United States v. Paramount Pictures, Inc., 334 U.S. 131 429, 432, 439
United States v. Patman, 557 F. 2d 1181 1023
United States v. Phosphate Export Assn., Inc., 393 U.S. 199 74–76
United States v. Price, 361 U.S. 304 26
United States v. Rangel-Gonzales, 617 F. 2d 529 922
United States v. Regilio, 669 F. 2d 1169 949
United States v. Rosal-Aguilar, 652 F. 2d 721 922

Page

United States v. Shimer, 367 U.S. 374 278
United States v. Shirey, 359 U.S. 255 359
United States v. Spector, 343 U.S. 169 922
United States v. Springer, 460 F. 2d 1344 1023
United States v. Stauffer Chemical Co., 464 U.S. 165 163, 164
United States v. Stone & Downer Co., 274 U.S. 225 179, 180
United States v. Summerlin, 310 U.S. 414 400
United States v. Taylor, 562 F. 2d 1345 514
United States v. Thevis, 474 F. Supp. 134 22, 26, 29
United States v. Trans-Missouri Freight Assn., 166 U.S. 290 74, 76
United States v. Turkette, 452 U.S. 576 20, 24, 27–29
United States v. United States District Court, 407 U.S. 297 297
United States v. Utah Construction & Mining Co., 384 U.S. 394 944
United States v. Velazquez, 490 F. 2d 29 509
United States v. Vinson, 606 F. 2d 149 948
United States v. Wong Kim Bo, 472 F. 2d 720 23
United States v. Wood, 299 U.S. 123 558
United States v. Wooten, 688 F. 2d 941 23
United States v. W. T. Grant Co., 345 U.S. 629 72, 74–76
United States Dept. of Agriculture v. FLRA, 691 F. 2d 1242 91
United States Parole Comm'n v. Geraghty, 445 U.S. 388 73
Virgin Islands v. Dowling, 633 F. 2d 660 949
Wade v. Hunter, 336 U.S. 684 509
Wadman v. INS, 329 F. 2d 812 187, 196, 197

Page
Wainwright v. Henry, 463 U.S. 1223 87
Walker v. Armco Steel Corp., 446 U.S. 740 544
Walling v. Helmerich & Payne, 323 U.S. 37 72, 74
Watt v. Alaska, 451 U.S. 259 217, 345
Webb v. Webb, 451 U.S. 493 1055
Wein Air Alaska, Inc. v. State, No. 3AN 81-8582 Civil (Alaska Super. Ct., 1983) 14
Weinberger v. Salfi, 422 U.S. 749 883
Weiss v. Temporary Investment Fund, Inc., 692 F. 2d 928 525
Whalen v. Roe, 429 U.S. 589 514, 971
Wheaton v. Peters, 8 Pet. 591 431, 439
White v. Florida, 458 U.S. 1301 48
White v. Maryland, 373 U.S. 59 129
White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1 430–432
Williams v. Blackburn, 649 F. 2d 1019 47
Williams v. Blackburn, 396 So. 2d 1249 49
Williams v. Maggio, 463 U.S. 1214 62
Williams v. Maggio, 679 F. 2d 381 47, 50
Williams v. Missouri, 463 U.S. 1301 1306, 1307
Williams & Wilkins Co. v. United States, 203 Ct. Cl. 74 431, 467, 476, 479, 484

Page
Wilson v. Cook, 327 U.S. 474 247
Wilson v. Edelman, 542 F. 2d 1260 886
Wilson v. Swing, 463 F. Supp. 555 966
Winship, In re, 397 U.S. 358 1025
Winter v. New York, 333 U.S. 507 970
Witherspoon v. Illinois, 391 U.S. 510 49, 50, 64, 380, 382, 905, 906, 908
Witmark & Sons v. Tremont Social & Athletic Club, 188 F. Supp. 787 488
W. R. Grace & Co. v. Rubber Workers, 461 U.S. 757 904
Wyrick v. Fields, 459 U.S. 42 1020
Young v. American Mini Theaters, Inc., 427 U.S. 50 519
Young v. Ricketts, 242 Ga. 559 1058
Young v. State, 237 Ga. 852 1058, 1063
Young v. Zant, 677 F. 2d 792 1058, 1059, 1061
Young v. Zant, 506 F. Supp. 274 1058
Younger v. Harris, 401 U.S. 37 943, 944
Zablocki v. Rehail, 434 U.S. 374 971
Zant v. Stephens, 462 U.S. 862 55, 58, 61, 1028
Zellerbach Paper Co. v. Helvering, 293 U.S. 172 394, 397, 402
Zemel v. Rusk, 381 U.S. 1 519
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 902
Zuber v. Allen, 396 U.S. 168 98
Zurcher v. Stanford Daily, 436 U.S. 547 299, 305

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1983

AUTRY *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS

ON APPLICATION FOR STAY

No. A-197. Decided October 3, 1983

After applicant's murder conviction and death sentence were affirmed by the Texas Court of Criminal Appeals, and his habeas corpus petition in the state system was denied, he filed for habeas corpus in Federal District Court, presenting some of the same claims that had been unavailing in the state system. The District Court denied the writ, and the United States Court of Appeals affirmed. Applicant then sought a stay of his sentence from the Circuit Justice, who referred the application to the Court.

Held: The application for stay is denied where fewer than four Justices would grant certiorari. And this Court will not adopt a rule calling for an automatic stay, regardless of the merits presented, where the applicant is seeking review of the denial of his first federal habeas corpus petition. Here, neither the District Court nor the Court of Appeals found sufficient merit in any of applicant's claims to warrant setting aside his conviction or sentence, and the Court of Appeals did not find that a stay of applicant's sentence pending certiorari was warranted.

Application for stay denied.

PER CURIAM.

Applicant was sentenced to death for killing two people while robbing a convenience store. His conviction and sentence were affirmed by the Texas Court of Criminal Appeals. *Autry* v. *State*, 626 S. W. 2d 758 (1982). We denied certiorari. 459 U. S. 882 (1982). Applicant then sought habeas corpus in the state system; that request was denied. He then filed for habeas corpus in the Federal District Court, presenting some of the same claims that had been unavailing in the state courts. The District Court held a hearing and filed an opinion denying the writ. In a detailed opinion, the Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court. 706 F. 2d 1394 (1983). It denied rehearing, as well as a stay pending the filing of a petition for certiorari in this Court. Applicant then sought a stay from the Circuit Justice, who referred the application to the Court. Absent a stay, applicant will be executed on October 5.

The application for stay is denied. The grounds on which applicant would request certiorari are amply evident from his application and from the opinions and the proceedings in the District Court and the Court of Appeals. Had applicant convinced four Members of the Court that certiorari would be granted on any of his claims, a stay would issue. But this is not the case; fewer than four Justices would grant certiorari. Applicant thus fails to satisfy one of the basic requirements for the issuance of a stay.

Nor are we inclined to adopt a rule calling for an automatic stay, regardless of the merits of the claims presented, where the applicant is seeking review of the denial of his first federal habeas corpus petition. Applicant has twice sought relief in the state court system. He has also presented his claims to the United States District Court and to the Court of Appeals. None of these judges found sufficient merit in any of applicant's claims to warrant setting aside applicant's conviction or his death sentence. Nor did any of the judges of the Court of Appeals believe that a stay pending certiorari was warranted. Those judges, stating that they were "fully sensitive to the consequence of our judgment and our oaths," 706 F. 2d, at 1408, found each of applicant's claims to be without merit and affirmed the dismissal of his habeas corpus petition. In these circumstances, it is quite appropriate to deny a stay of applicant's sentence, just as we do in other criminal cases that we are convinced do not merit review in this Court. As the Court said just last Term in *Barefoot* v. *Estelle*, 463 U. S. 880, 887–888 (1983):

> "[I]t must be remembered that direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception. When the process of direct review—which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari—comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials. Even less is federal habeas a means by which a defendant is entitled to delay an execution indefinitely. The procedures adopted to facilitate the orderly consideration and disposition of habeas petitions are not legal entitlements that a defendant has a right to pursue irrespective of the contribution these procedures make toward uncovering constitutional error."

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

I join JUSTICE STEVENS' dissent, and because I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would, in any case, grant the application for a stay of execution.

JUSTICE STEVENS, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

Last year the applicant's death sentence was affirmed by the Texas Court of Criminal Appeals. *Autry* v. *State*, 626

S. W. 2d 758, cert. denied, 459 U. S. 882 (1982). On January 14, 1983, the United States District Court for the Eastern District of Texas denied the applicant's first petition for a writ of habeas corpus pursuant to 28 U. S. C. § 2254 after holding an evidentiary hearing. On June 17, 1983, after full briefing and argument, the United States Court of Appeals for the Fifth Circuit issued a carefully prepared 16-page opinion affirming the District Court's denial of the petition. 706 F. 2d 1394. Rehearing was denied on August 4, 1983, and on September 1, 1983, Texas authorities scheduled the applicant to be executed on October 5, 1983. He has applied for a stay of execution pending filing and disposition of a petition for a writ of certiorari. The Texas Attorney General does not oppose the stay application.

The time in which the applicant may file a petition for a writ of certiorari in this Court will not expire until November 2, 1983—four weeks after his scheduled execution. Thus, unless a stay is granted, the applicant will be executed before the applicant's time for petitioning this Court for a writ of certiorari expires.

The stay application makes it clear that the applicant's claims are not frivolous. Moreover, since this is the applicant's first federal habeas corpus proceeding, we are not confronted with the prospect of indefinite delay of execution which exists when an applicant has burdened the judicial system with successive federal petitions. On the other hand, on the basis of the papers that have been filed to date, I must acknowledge that I am presently of the opinion that this applicant will be unable to establish that a writ of certiorari should issue. My opinion, however, is necessarily tentative because the stay application contains only a synopsis of the arguments that counsel intends to make in a certiorari petition that has yet to be filed.

The decision to grant or to deny a stay pending the filing of a petition for a writ of certiorari depends on our assessment of the likelihood that such a petition will be granted and a balancing of the relative hardships of the parties. When a denial of a stay merely subjects the applicant to a continuing harm pending our decision on a subsequently filed certiorari petition, it is appropriate to deny the application unless the applicant demonstrates a likelihood that his petition will be granted. If it transpires that our tentative assessment of his case was incorrect, that error can be corrected by granting the subsequently filed certiorari petition, though naturally nothing can eliminate the interim harm the applicant suffered. In the instant case, however, a decision on the application is a final decision on the certiorari question—a decision to deny the stay renders a petition moot. The impact of our decision is therefore in no sense tentative, but our assessment of the case can only be a tentative one because it is based on probability rather than actuality. Accordingly, a preliminary negative evaluation of the certiorari question should not be the end of our analysis; we should also balance the relative hardships on the parties. I would strike that balance in favor of any applicant raising a nonfrivolous challenge to his capital conviction in his first federal habeas proceeding. In such a case, the importance of fully informed consideration of the certiorari question predominates over the interests of the State in expeditious execution of its judgment.

In one sense, the practical question that is raised by this stay application is whether the Court should give habeas petitioners on death row the same time to prepare and file certiorari petitions that other litigants receive. Unless the claims are frivolous, I believe that the overriding interest in the evenhanded administration of justice would be served by according an individual raising his first federal habeas challenge to his capital conviction the same opportunity to seek review in this Court as is accorded to other individuals.

The practice adopted by the majority effectively confers upon state authorities the power to dictate the period in which these federal habeas petitioners may seek review in this Court by scheduling an execution prior to the expiration of the period for filing a certiorari petition. Shortening the period allowed for filing a petition on such an ad hoc basis injects uncertainty and disparity into the review procedure, adds to the burdens of counsel, distorts the deliberative process within this Court, and increases the risk of error. Procedural shortcuts are always dangerous.* Greater—surely not lesser—care should be taken to avoid the risk of error when its consequences are irreversible.

I respectfully dissent.

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*"In my opinion the preservation of order in our communities will be best ensured by adherence to established and respected procedures. Resort to procedural expediency may facilitate an occasional conviction, but it may also make martyrs of common criminals." *Groppi* v. *Leslie*, 436 F. 2d 331, 336 (CA7 1971) (en banc) (Stevens, J., dissenting).

ALOHA AIRLINES, INC. *v.* DIRECTOR OF TAXATION OF HAWAII

APPEAL FROM THE SUPREME COURT OF HAWAII

No. 82-585. Argued October 4, 1983—Decided November 1, 1983*

A Hawaii statute imposes a tax on the annual gross income of airlines operating within the State, and declares that such tax is a means of taxing an airline's personal property. Section 7(a) of the Airport Development Acceleration Act of 1973 (ADAA) prohibits a State from levying a tax, "directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom," but provides that property taxes are not included in this prohibition. Appellant airlines each brought an action for refund of taxes assessed under the Hawaii statute, claiming that the statute was pre-empted by § 7(a). The Hawaii Tax Appeal Court rejected this pre-emption argument, and the Hawaii Supreme Court affirmed.

Held: Section 7(a) pre-empts the Hawaii statute. Pp. 11-15.

(a) When a federal statute unambiguously forbids a State to impose a particular kind of tax on an industry affecting interstate commerce, as § 7(a) does here by its plain language, courts need not look beyond the federal statute's plain language to determine whether a state statute that imposes such a tax is pre-empted. P. 12.

(b) Moreover, nothing in the ADAA's legislative history suggests that Congress intended to limit § 7(a)'s pre-emptive effect to taxes on airline passengers or to save gross receipts taxes such as the one Hawaii imposes. Although § 7(a) was enacted to deal primarily with local head taxes on airline passengers, the legislative history contains many references to the fact that § 7(a) pre-empts state taxes on gross receipts of airlines. Pp. 12-13.

(c) The fact that the Hawaii tax is styled as a property tax measured by gross receipts rather than as a straightforward gross receipts tax does not entitle the tax to escape pre-emption under § 7(a)'s property tax exemption. Such styling of the tax does not mask the fact that the purpose and effect of the tax are to impose a levy upon the gross receipts

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*Together with No. 82-586, *Hawaiian Airlines, Inc.* v. *Director of Taxation of Hawaii*, also on appeal from the same court.

of airlines, thus making it at least an "indirect" tax on such receipts. Pp. 13–14.

65 Haw. 1, 647 P. 2d 263, reversed and remanded.

MARSHALL, J., delivered the opinion for a unanimous Court.

Richard L. Griffith argued the cause for appellants in both cases. With him on the briefs were *Michael A. Shea, Richard R. Clifton, Hugh Shearer,* and *H. Mitchell D'Olier.*

William D. Dexter argued the cause for appellee. With him on the brief was *Kevin T. Wakayama.*†

JUSTICE MARSHALL delivered the opinion of the Court.

These appeals present the question whether 49 U. S. C. § 1513(a) pre-empts a Hawaii statute that imposes a tax on the gross income of airlines operating within the State. We conclude that the Hawaii tax is pre-empted.

I

In 1970, Congress committed the Federal Government to assisting States and localities in expanding and improving the Nation's air transportation system. See Airport and Airway Development Act of 1970, Pub. L. 91–258, 84 Stat. 219. In the same session, Congress established the Airport and Airway Trust Fund to funnel federal resources to local airport expansion and improvement projects. See Airport and Airway Revenue Act of 1970, Pub. L. 91–258, § 208, 84 Stat. 250. As originally devised, the Trust Fund received its revenues from several federal aviation taxes, including an 8% tax on domestic airline tickets, a $3 head tax on international flights out of the United States, and a 5% tax on air freight. See §§ 203, 204, 84 Stat. 238, 240 (codified, as amended, at 26 U. S. C. §§ 4261, 4271 (1976 ed. and Supp. V)). See generally *Massachusetts* v. *United States*, 435 U. S. 444 (1978).

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†Briefs of *amici curiae* urging affirmance were filed for the State of Alaska et al. by *Kenneth O. Eikenberry,* Attorney General of Washington, and *Jeffrey D. Goltz,* Assistant Attorney General, *Norman C. Gorsuch,* Attorney General of Alaska, and *Diane T. Colvin,* Assistant Attorney General, *Robert K. Corbin,* Attorney General of Arizona, *Michael C. Turpen,* Attorney General of Oklahoma, *Chauncey H. Browning,* Attorney General of West Virginia, and *Jack C. McClung,* Deputy Attorney General; and for the Multistate Tax Commission et al. by *Eugene F. Corrigan.*

Briefs of *amici curiae* were filed for the State of New York by *Robert Abrams,* Attorney General, *Peter H. Schiff,* and *Francis V. Dow,* Assistant Attorney General; and for the Air Transport Association of America by *Andrew C. Hartzell, Jr.*

Once the Airport and Airway Development Act was passed and the Trust Fund established, the question arose whether States and municipalities were still free to impose additional taxes on airlines and air travelers. In *Evansville-Vanderburgh Airport Authority Dist.* v. *Delta Airlines, Inc.*, 405 U. S. 707 (1972), this Court ruled that neither the Commerce Clause nor the Airport and Airway Development Act precluded state or local authorities from assessing head taxes on passengers boarding flights at state or local airports. In particular the Court noted: "No federal statute or specific congressional action or declaration evidences a congressional purpose to deny or pre-empt state and local power to levy charges designed to help defray the costs of airport construction and maintenance." *Id.*, at 721.

Following the *Evansville-Vanderburgh Airport* decision, Committees in both Houses of Congress held hearings on local taxation of air transportation.[1] Both Committees concluded that the proliferation of local taxes burdened interstate air transportation, and, when coupled with the federal Trust Fund levies, imposed double taxation on air travelers.[2] To deal with these problems, Congress passed § 7(a) of the

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[1] See Hearings on S. 2397 et al. before the Subcommittee on Aviation of the Senate Committee on Commerce, 92d Cong., 2d Sess., 129–198 (1972); Hearings on H. R. 2337 et al. before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 92d Cong., 2d Sess. (1972).

[2] See S. Rep. No. 93–12, pp. 17, 20–21 (1973); H. R. Rep. No. 93–157, pp. 4–5 (1973).

Airport Development Acceleration Act of 1973 (ADAA), the provision at issue in these appeals. See Pub. L. 93–44, § 7(a), 87 Stat. 90. That section, which is currently codified at 49 U. S. C. § 1513,[3] reads:

> "(a) No State . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom. . . .
>
> "(b) Nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services. . . ."

For States with taxes that were in effect prior to May 21, 1970, and would be pre-empted by § 1513(a), Congress postponed the effective date of the section until December 31, 1973. *Ibid.*

II

Appellants Aloha Airlines, Inc., and Hawaiian Airlines, Inc., are both commercial airlines that carry passengers, freight, and mail among the islands of Hawaii. Throughout the periods relevant to these appeals, appellants have been Hawaii public service companies, see Haw. Rev. Stat. §§ 239–2, 269–1 (1976 and Supp. 1982), and subject to the State's public service company tax, which provides:

> "There shall be levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business . . . . The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including

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[3] In 1982, Congress amended 49 U. S. C. § 1513 to prohibit discriminatory property taxes imposed on air carriers. See Airport and Airway Improvement Act of 1982, Pub. L. 97–248, § 532, 96 Stat. 701 (codified at 49 U. S. C. § 1513(d) (1982 ed.)). Being enacted after the relevant periods, this amendment has no bearing on these appeals.

going concern value, and is in lieu of the [general excise] tax imposed by chapter 237 but is not in lieu of any other tax." § 239–6 (1976).

In 1978, appellant Aloha Airlines sought refunds for taxes assessed under this provision for the carriage of passengers between 1974 and 1977 on the ground that 49 U. S. C. § 1513(a) had pre-empted Haw. Rev. Stat. § 239–6 as of December 31, 1973. In 1979, appellant Hawaiian Airlines filed a similar action seeking a refund for taxes paid between 1974 and 1978. In separate decisions, the Tax Appeal Court of the State of Hawaii rejected appellants' pre-emption arguments, *In re Aloha Airlines, Inc.*, No. 1772 (June 9, 1978); *In re Hawaiian Airlines, Inc.*, Nos. 1853, 1868 (Jan. 4, 1980). On consolidated appeal, the Hawaii Supreme Court affirmed, one justice dissenting, *In re Aloha Airlines, Inc.*, 65 Haw. 1, 647 P. 2d 263 (1982). Appellants then filed timely notices of appeal, this Court noted probable jurisdiction, 459 U. S. 1101 (1983), and we now reverse.

III

The plain language of 49 U. S. C. § 1513(a) would appear to invalidate Haw. Rev. Stat. § 239–6. Section 1513(a) expressly pre-empts gross receipts taxes on the sale of air transportation or the carriage of persons traveling in air commerce, and Haw. Rev. Stat. § 239–6 is a state tax on the gross receipts[4] of airlines selling air transportation and carrying persons traveling in air commerce. The Hawaii Supreme Court sought to avoid this direct conflict by looking beyond the language of § 1513(a) to Congress' purpose in enacting the statute. The court concluded that Congress passed the ADAA to deal with the proliferation of local and state head taxes on airline passengers in the early 1970's. Since Haw. Rev. Stat. § 239–6 is imposed upon air carriers as opposed to air travelers, the Hawaii court reasoned that the provision did not come within the ambit of § 1513(a)'s prohibitions.

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[4] Appellee concedes that the phrase "gross income," under Haw. Rev. Stat. § 239–6, is synonymous with the phrase "gross receipts" used in 49 U. S. C. § 1513(a). See Brief for Appellee 7, n. 2.

We cannot agree with the Hawaii Supreme Court's analysis. First, when a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is pre-empted.[5] Thus, the Hawaii Supreme Court erred in failing to give effect to the plain meaning of § 1513(a).[6]

Second, even if the absence of an express proscription made it necessary to go beyond the plain language of § 1513(a), nothing in the legislative history of the ADAA suggests that Congress intended to limit § 1513(a)'s pre-emptive effect to taxes on airline passengers or to save gross receipts taxes like § 239-6.[7] Although Congress passed § 1513(a) to deal primarily with local head taxes on airline passengers, the legislative history abounds with references to the fact that § 1513(a) also pre-empts state taxes on the gross receipts of airlines.[8] For example, Senator Cannon, one of the ADAA's sponsors, clearly stated in floor debate: "The bill prohibits the levying of State or local head taxes, fees, gross receipts taxes or other such charges either on passengers or on the carriage of such passengers in interstate commerce." 119 Cong. Rec. 3349 (1973).

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[5] The Hawaii Supreme Court apparently considered itself obliged by *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218 (1947), and its progeny to examine thoroughly Congress' intentions before declaring Haw. Rev. Stat. § 239-6 pre-empted. *In re Aloha Airlines, Inc.*, 65 Haw. 1, 13-16, 647 P. 2d 263, 272-273 (1982). *Rice* and its progeny, however, involved the implicit pre-emption of state statutes. Rules developed in these cases apply when a court must decide whether a state law should be pre-empted even though Congress has not expressly legislated pre-emption. These rules, therefore, have little application when a court confronts a federal statute like § 1513(a) that explicitly pre-empts state laws.

[6] The Hawaii Supreme Court professed confusion over the "paradox" between § 1513(a)'s prohibition on certain state taxes on air transportation and § 1513(b)'s reservation of the States' primary sources of revenue, such as property taxes, net income taxes, franchise taxes, and sales or use taxes. *In re Aloha Airlines, Inc., supra,* at 16, 647 P. 2d, at 273. We find no paradox between § 1513(a) and § 1513(b). Section 1513(a) pre-empts a limited number of state taxes, including gross receipts taxes imposed on the sale of air transportation or the carriage of persons traveling in air commerce. Section 1513(b) clarifies Congress' view that the States are still free to impose on airlines and air carriers "taxes other than those enumerated in subsection (a)," such as property taxes, net income taxes, and franchise taxes. While neither the statute nor its legislative history explains exactly why Congress chose to distinguish between gross receipts taxes imposed on airlines and the taxes reserved in § 1513(b), the statute is quite clear that Congress chose to make the distinction, and the courts are obliged to honor this congressional choice.

Finally, we are unpersuaded by appellee's contention that, because the Hawaii Legislature styled § 239-6 as a property tax measured by gross receipts rather than a straightforward gross receipts tax, the provision should escape pre-emption under § 1513(b)'s exemption for property taxes. The manner in which the state legislature has described and categorized § 239-6[9] cannot mask the fact that the purpose and effect of the provision are to impose a levy upon the gross receipts of airlines. Section 1513(a) expressly prohibits States from taxing "directly or indirectly" gross receipts derived from air transportation. Beyond question, a property tax that is measured by gross receipts constitutes at least an "indirect" tax on the gross receipts of airlines. A state statute that imposes such a tax is therefore pre-empted.[10]

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[7] Indeed, Congress was presented an opportunity to exempt gross receipts taxes from § 1513(a), and declined to grant the exemption. During House hearings on the ADAA, a representative of the Ohio Tax Commission asked the Subcommittee responsible for the bill to expand § 1513(b) to permit state "gross receipts taxes fairly apportioned to a State," so that Ohio could maintain a gross receipts tax similar to Hawaii's § 239-6. See Hearings on H. R. 4082 before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 93d Cong., 1st Sess., 246-253 (1973). When Congress enacted the ADAA without Ohio's proposed amendment, the State Attorney General issued an opinion concluding that Ohio's gross receipts tax was preempted. See Ohio Op. Atty. Gen. No. 73-117 (Nov. 20, 1973).

[8] See, *e. g.*, S. Rep. No. 93-12, p. 6 (1973); H. R. Conf. Rep. No. 93-225, p. 5 (1973); 119 Cong. Rec. 18045 (1973) (statement of Sen. Cannon); *id.*, at 17345 (statement of Rep. Devine).

[9] The most likely explanation for the seemingly curious way in which the legislature characterized § 239-6 is that, at one time, this Court distinguished between the manner in which a state statute was measured and

IV

In conclusion, we join with state courts of Alaska and New York[11] in the view that § 1513(a) proscribes the imposition of

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the subject matter of the tax when assessing the validity of the tax under the Commerce Clause. Compare *Railway Express Agency, Inc.* v. *Virginia*, 358 U. S. 434 (1959) (upholding a property tax measured by gross receipts), with *Railway Express Agency, Inc.* v. *Virginia*, 347 U. S. 359 (1954) (striking down a functionally equivalent business privilege tax). But cf. *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977). The constitutionality of § 239-6 is of course not at issue in these appeals.

[10] The unambiguous proscription contained in § 1513(a) compels us to conclude that it pre-empts Haw. Rev. Stat. § 239-6 as well as other state taxes imposed on or measured by the gross receipts of airlines. *Amici* point out that several States have taxation statutes similar to § 239-6 and that the ability of those States to retain revenues collected from airlines during the past decade will be affected by our decision today. We acknowledge that our interpretation of § 1513(a) may result in the disruption of state systems of taxation; we are, however, bound by the plain language of the statute. Congress clearly has the authority to regulate state taxation of air transportation in interstate commerce, see *Arizona Public Service Co.* v. *Snead*, 441 U. S. 141, 150 (1979), and we trust that Congress will amend § 1513(a) if it concludes, upon reconsideration, that the pre-emptive sweep of the current version is too great.

[11] *Wein Air Alaska, Inc.* v. *State*, No. 3AN 81-8582 Civil (Alaska Super. Ct., May 6, 1983), appeal docketed (Alaska Sup. Ct.); *Air Transport Assn. of America* v. *New York State Dept. of Taxation and Finance*, 91 App. Div. 2d 169, 458 N. Y. S. 2d 709, aff'd, 59 N. Y. 2d 917, 453 N. E. 2d 548 (1983), cert. pending, No. 83-162; cf. *State ex rel. Arizona Dept. of Revenue* v. *Cochise Airlines*, 128 Ariz. 432, 626 P. 2d 596 (App. 1980) (§ 1513(a) pre-empts state gross receipts taxes on the carriage of passengers, but not freight, in air commerce); see also *Allegheny Airlines, Inc.* v. *City of Philadelphia*, 453 Pa. 181, 309 A. 2d 157 (1973) (finding a Philadelphia head tax on air passengers pre-empted).

state and local taxes on gross receipts derived from air transportation or the carriage of persons in air commerce. The judgment of the Supreme Court of the State of Hawaii is reversed, and the cases are remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

RUSSELLO *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 82–472. Argued October 5, 1983—Decided November 1, 1983

Petitioner was convicted in Federal District Court, under the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970, of violating 18 U. S. C. §§ 1962(c) and (d) by being involved in an arson ring that resulted in his fraudulently receiving insurance proceeds in payment for the fire loss of a building he owned. The District Court also entered a judgment of forfeiture against petitioner for the amount of the insurance proceeds pursuant to 18 U. S. C. § 1963(a)(1), which provides that a person convicted under § 1962 shall forfeit to the United States "any interest he has acquired or maintained in violation of section 1962." The Court of Appeals affirmed.

Held: The insurance proceeds petitioner received as a result of his arson activities constitute an "interest" within the meaning of § 1963(a)(1) and are therefore subject to forfeiture. Pp. 20–29.

(a) Section 1963(a)(1) does not reach only "interests in an enterprise." Where the term "interest" is not specifically defined in the RICO statute, it is assumed that the legislative purpose is expressed by the term's ordinary meaning, which comprehends all forms of real and personal property, including profits and proceeds. Congress apparently selected the broad term "interest" because it did not wish the forfeiture provision to be limited by rigid and technical definitions drawn from other areas of law and because the term was fully consistent with the RICO statute's pattern in utilizing broad terms and concepts. Every property interest, including a right to profits or proceeds, may be described as an interest in something. Before profits of an illegal enterprise are divided, each participant may be said to own an "interest" in the ill-gotten gains, and after distribution each has a possessory interest in currency or other items so distributed. Pp. 20–22.

(b) Had Congress intended to restrict § 1963(a)(1) to an interest in an enterprise, it presumably would have done so expressly as it did in § 1963(a)(2). To construe § 1963(a)(1) to reach only interests in an enterprise would blunt the section's effectiveness in combating illegitimate enterprises and would mean that whole areas of organized crime activity would be placed beyond the reach of the RICO statute. Pp. 22–24.

(c) The fact that the Controlled Substances Act specifically authorizes the forfeiture of "profits" obtained in illegal drug enterprises cannot be read as imposing a limitation upon § 1963(a)(1)'s broader language, particularly where the RICO statute was aimed at organized crime's economic power in all its forms, whereas the narcotics activity proscribed by the Controlled Substances Act usually generates only monetary profits. Pp. 24–25.

(d) Nor is a limiting construction of § 1963(a)(1) supported by the fact that certain state racketeering statutes expressly provide for the forfeiture of "profits," "money," "interest or property," or "all property, real or personal," acquired from racketeering, since those States presumably used such language so as to avoid narrow interpretations of their laws such as was given the federal statute in certain Federal District Court opinions. P. 26.

(e) The legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots, and thus was intended to authorize forfeiture of racketeering profits. The rule of lenity does not apply here, where § 1963(a)(1)'s language is clear. Pp. 26–29.

681 F. 2d 952, affirmed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Ronald A. Dion argued the cause for petitioner. With him on the brief was *Alvin E. Entin.*

Samuel A. Alito, Jr., argued the cause for the United States. With him on the briefs were *Solicitor General Lee, Assistant Attorney General Jensen, Deputy Solicitor General Frey*, and *Sara Criscitelli.*

JUSTICE BLACKMUN delivered the opinion of the Court.

This is yet another case concerning the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970. Pub. L. 91–452, Title IX, 84 Stat. 941, as amended, 18 U. S. C. §§ 1961–1968 (1982 ed.). At issue here is the interpretation of the chapter's forfeiture provision, § 1963(a)(1), and, specifically, the meaning of the words "any interest [the defendant] has acquired . . . in violation of section 1962."

I

On June 8, 1977, petitioner Joseph C. Russello and others were indicted for racketeering, conspiracy, and mail fraud, in violation of 18 U. S. C. §§ 1341, 1962(c) and (d), and 2. App. 5. After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted as charged in four counts of the indictment. The jury then returned special verdicts for the forfeiture to the United States, under 18 U. S. C. § 1963(a), of four payments, aggregating $340,043.09, made to petitioner by a fire insurance company. App. 54–57. These verdicts related to the racketeering activities charged in the second count of the indictment under which petitioner had been convicted. The District Court, accordingly, entered a judgment of forfeiture against petitioner in that amount. *Id.*, at 58.

Petitioner took an appeal to the former United States Court of Appeals for the Fifth Circuit. A panel of that court affirmed petitioner's criminal conviction, *United States* v. *Martino*, 648 F. 2d 367, 406 (1981), and this Court denied certiorari, 456 U. S. 943 (1982), as to that aspect of the case. The panel, however, reversed the judgment of forfeiture. App. 64–69. The full court granted rehearing en banc on the forfeiture issue and, by a vote of 16–7, vacated that portion of the panel opinion, and then affirmed the forfeiture judgment entered by the District Court. *United States* v. *Martino*, 681 F. 2d 952 (1982). Because of this significant division among the judges of the Court of Appeals, and because the Fifth Circuit majority, *id.*, at 959, stated that its holding "squarely conflict[ed]" with that of the Ninth Circuit in *United States* v. *Marubeni America Corp.*, 611 F. 2d 763 (1980), we granted certiorari. 459 U. S. 1101 (1983).[1] Since then, the Seventh Circuit has issued an opinion agreeing with the Ninth Circuit. *United States* v. *McManigal*, 708 F. 2d 276, 283–287 (1983).

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[1] The Solicitor General, while perceiving "a factual distinction between *Marubeni* and the present case," felt that "the holding and reasoning of *Marubeni* would require the Ninth Circuit to reach the opposite result from the Fifth Circuit on the facts of the instant case." Memorandum for United States 4, n. 3. Accordingly, he joined in the prayer that a writ of certiorari be granted.

II

So far as the case in its present posture is concerned, the basic facts are not in dispute. The majority opinion of the en banc court described them succinctly:

> "Briefly, the evidence showed that a group of individuals associated for the purpose of committing arson with the intent to defraud insurance companies. This association in fact enterprise, composed of an insurance adjuster, homeowners, promoters, investors, and arsonists, operated to destroy at least eighteen residential and commercial properties in Tampa and Miami, Florida between July 1973 and April 1976. The panel summarized the ring's operations as follows:
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> "'At first the arsonists only burned buildings already owned by those associated with the ring. Following a burning, the building owner filed an inflated proof of loss statement and collected the insurance proceeds from which his co-conspirators were paid. Later, ring members bought buildings suitable for burning, secured insurance in excess of value and, after a burning, made claims for the loss and divided the proceeds'." 681 F. 2d, at 953 (footnote omitted).

Specifically, petitioner was the owner of the Central Professional Building in Tampa. This structure had two parts, an original smaller section in front and a newer addition at the rear. The latter contained apartments, offices, and parking facilities. Petitioner arranged for arsonists to set fire to the front portion. He intended to use the insurance proceeds to rebuild that section. The fire, however, spread to the rear. Joseph Carter, another member of the arson ring, was the adjuster for petitioner's insurance claim and helped him to obtain the highest payments possible. The resulting payments made up the aggregate sum of $340,043.09

mentioned above. From those proceeds, petitioner paid Carter $30,000 for his assistance.

III

Title 18 U. S. C. § 1962(c) states that it shall be unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate . . . commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." Section 1962(d) makes it unlawful to conspire to violate § 1962(c). Section 1963(a)(1) provides that a person convicted under § 1962 shall forfeit to the United States "any interest he has acquired or maintained in violation of section 1962."

The sole issue in this case is whether profits and proceeds derived from racketeering constitute an "interest" within the meaning of this statute and are therefore subject to forfeiture. Petitioner contends that § 1963(a)(1) reaches only "interests in an enterprise" and does not authorize the forfeiture of mere "profits and proceeds." He rests his argument upon the propositions that criminal forfeitures are disfavored in law and that forfeiture statutes, as a consequence, must be strictly construed.

In a RICO case recently decided, this Court observed: "In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *United States* v. *Turkette*, 452 U. S. 576, 580 (1981), quoting from *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980). See also *Dickerson* v. *New Banner Institute, Inc.*, 460 U. S. 103, 110 (1983); *Lewis* v. *United States*, 445 U. S. 55, 60 (1980).

Here, 18 U. S. C. § 1963(a)(1) calls for the forfeiture to the United States of "any interest . . . acquired . . . in violation of section 1962." There is no question that petitioner Russello acquired the insurance proceeds at issue in violation of § 1962(c); that much has been definitely and finally settled. Accordingly, if those proceeds qualify as an "interest," they are forfeitable.

The term "interest" is not specifically defined in the RICO statute. This silence compels us to "start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards* v. *United States*, 369 U. S. 1, 9 (1962). The ordinary meaning of "interest" surely encompasses a right to profits or proceeds. See Webster's Third New International Dictionary 1178 (1976), broadly defining "interest," among other things, as a "good," "benefit," or "profit." Random House Dictionary of the English Language 741 (1979) defines interest to include "benefit." Black's Law Dictionary 729 (5th ed., 1979) provides a significant definition of "interest": "The most general term that can be employed to denote a right, claim, title, or legal share in something." It is thus apparent that the term "interest" comprehends all forms of real and personal property, including profits and proceeds.

This Court repeatedly has relied upon the term "interest" in defining the meaning of "property" in the Due Process Clause of the Fourteenth Amendment of the Constitution. See *Perry* v. *Sindermann*, 408 U. S. 593, 601 (1972) ("'property' denotes a broad range of interests"); *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 430 (1982); *Jago* v. *Van Curen*, 454 U. S. 14, 17–18 (1981). It undoubtedly was because Congress did not wish the forfeiture provision of § 1963(a) to be limited by rigid and technical definitions drawn from other areas of the law that it selected the broad term "interest" to describe those things that are subject to forfeiture under the statute. Congress selected this general term apparently because it was fully consistent with the pattern of the RICO statute in utilizing terms and concepts of breadth. Among these are "enterprise" in § 1961(4); "racketeering activity" in § 1961(1) (1982 ed.); and "participate" in § 1962(c).

Petitioner himself has not attempted to define the term "interest" as used in § 1963(a)(1). He insists, however, that the term does not reach money or profits because, he says: "'Interest,' by definition, includes of necessity an interest in something." Brief for Petitioner 9. Petitioner then asserts that the "something" emerges from the wording of § 1963(a)(1) itself, that is, an interest "acquired . . . in violation of section 1962," and thus derives its meaning from the very activities barred by the statute. In other words, a direct relationship exists between that which is subject to forfeiture as a result of racketeering activity and that which constitutes racketeering. This relationship, it is said, means that forfeiture is confined to an interest in an "enterprise" itself. Petitioner derives support for this approach from *United States* v. *Marubeni America Corp.*, *supra*, and from language contained in two Federal District Court opinions, *United States* v. *Meyers*, 432 F. Supp. 456, 461 (WD Pa. 1977), and *United States* v. *Thevis*, 474 F. Supp. 134, 142 (ND Ga. 1979), aff'd on other grounds, 665 F. 2d 616 (CA5 1982). He also now relies on the *McManigal* case, *supra*, recently decided by the Seventh Circuit. Tr. of Oral Arg. 4.

We do not agree. Every property interest, including a right to profits or proceeds, may be described as an interest in something. Before profits of an illegal enterprise are divided, each participant may be said to own an "interest" in the ill-gotten gains. After distribution, each will have a possessory interest in currency or other items so distributed. We therefore conclude that the language of the statute plainly covers the insurance proceeds petitioner received as a result of his arson activities.

IV

We are fortified in this conclusion by our examination of the structure of the RICO statute. We disagree with those courts that have felt that a broad construction of the word "interest" is necessarily undermined by the statute's other forfeiture provisions. The argument for a narrow construction of § 1963(a)(1) is refuted by the language of the succeeding subsection (a)(2). The former speaks broadly of "any interest . . . acquired," while the latter reaches only "any interest in . . . any enterprise which [the defendant] has established[,] operated, controlled, conducted, or participated in the conduct of, in violation of section 1962." Similar less expansive language appears in §§ 1962(b) and 1964(a). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *United States* v. *Wong Kim Bo*, 472 F. 2d 720, 722 (CA5 1972). See *United States* v. *Wooten*, 688 F. 2d 941, 950 (CA4 1982). Had Congress intended to restrict § 1963(a)(1) to an interest in an enterprise, it presumably would have done so expressly as it did in the immediately following subsection (a)(2). See *North Haven Board of Education* v. *Bell*, 456 U. S. 512, 521 (1982); *United States* v. *Naftalin*, 441 U. S. 768, 773–774 (1979). In the latter case, *id.*, at 773, the Court said: "The short answer is that Congress did not write the statute that way." We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.

The evolution of these statutory provisions supplies further evidence that Congress intended § 1963(a)(1) to extend beyond an interest in an enterprise. An early proposed version of RICO, S. 1861, 91st Cong., 1st Sess. (1969), had a single forfeiture provision for § 1963(a) that was limited to "all interest in the enterprise." This provision, however, later was divided into the present two subsections and the phrase "in the enterprise" was excluded from the first. Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended. See *Arizona* v. *California*, 373 U. S. 546, 580–581 (1963). See Weiner, Crime Must Not Pay: RICO Criminal Forfeiture in Perspective, 1981 N. Ill. U. L. Rev. 225, 238, and n. 49. It is no answer to say, as petitioner does, Brief for Petitioner 17–18, that if the term "interest" were as all-encompassing as suggested by the majority opinion of the Court of Appeals, § 1963(a)(2) would have no meaning independent of § 1963(a)(1), and would be mere surplusage. This argument is plainly incorrect. Subsection (a)(1) reaches "any interest," whether or not in an enterprise, provided it was "acquired . . . in violation of section 1962." Subsection (a)(2), on the other hand, is restricted to an interest in an enterprise, but that interest itself need not have been illegally acquired. Thus, there are things forfeitable under one, but not the other, of each of the subsections.[2]

We note that the RICO statute's definition of the term "enterprise" in § 1961(4) encompasses both legal entities and illegitimate associations-in-fact. See *United States* v. *Turkette*, 452 U. S., at 580–593. Forfeiture of an interest in an illegitimate association-in-fact ordinarily would be of little use because an association of that kind rarely has identifiable assets; instead, proceeds or profits usually are distributed immediately. Thus, construing § 1963(a)(1) to reach only interests in an enterprise would blunt the effectiveness of the provision in combating illegitimate enterprises, and would mean that "[w]hole areas of organized criminal activity would be placed beyond" the reach of the statute. *United States* v. *Turkette*, 452 U. S., at 589.

Petitioner stresses that 21 U. S. C. § 848(a)(2), contained in the Controlled Substances Act, 84 Stat. 1242, as amended, specifically authorizes the forfeiture of "profits" obtained in a continuing criminal enterprise engaged in certain drug offenses. Brief for Petitioner 6–7. The Ninth Circuit in

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[2] There may well be factual situations to which both subsections apply. The subsections, however, are clearly not wholly redundant.

Marubeni, 611 F. 2d, at 766, n. 7, placed similar reliance upon § 848(a)(2) and observed that the two statutes were passed by the same Congress in the same month. We feel, however, that the specific mention of "profits" in the Controlled Substances Act cannot be accepted as an indication that the broader language of § 1963(a)(1) was not meant to reach profits as well as other types of property interests. Language in one statute usually sheds little light upon the meaning of different language in another statute, even when the two are enacted at or about the same time. The term "profits" is specific; the term "interest" is general. The use of the specific in the one statute cannot fairly be read as imposing a limitation upon the general provision in the other statute. In addition, the RICO statute was aimed at organized crime's economic power in all its forms, and it was natural to use the broad term "interest" to fulfill that aim. In contrast, the narcotics activity proscribed by § 848 usually generates only monetary profits, a fact which would explain the use of the narrower term in § 848(a)(2).

Petitioner, of course, correctly suggests that Members of Congress who voted for the RICO statute were aware of the Controlled Substances Act. See 116 Cong. Rec. 33651 (1970) (remarks of Rep. Brotzman); *id.*, at 1180–1182 (remarks of Sen. Thurmond); *id.*, at 33631 (remarks of Rep. Weicker); *id.*, at 33646 (remarks of Rep. Kastenmeier); *id.*, at 35318 (remarks of Rep. Anderson). It is most unlikely, however, that without explanation a potent forfeiture weapon was withheld from the RICO statute, intended for use in a broad assault on organized crime, while the same weapon was included in the Controlled Substances Act, meant for use in only one part of the same struggle. If this was Congress' intent, one would expect it to have said so in clear and understandable terms.

Petitioner also suggests that subsequent proposed legislation demonstrates that the RICO forfeiture provision of 1970 excludes profits. Brief for Petitioner 29–34. The bills to which petitioner refers, however, were introduced in order to overcome the decisions in *Marubeni*, *Meyers*, and *Thevis*. See, *e. g.*, S. 2320, 97th Cong., 2d Sess. (1982). The introduction of these bills hardly suggests that their sponsors viewed those decisions as correct interpretations of § 1963(a)(1). See *United States* v. *Gordon*, 638 F. 2d 886, 888, n. 5 (CA5), cert. denied, 452 U. S. 909 (1981). In any event, it is well settled that "'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Jefferson County Pharmaceutical Assn.* v. *Abbott Laboratories*, 460 U. S. 150, 165, n. 27 (1983), quoting from *United States* v. *Price*, 361 U. S. 304, 313 (1960). See also *United States* v. *Clark*, 445 U. S. 23, 33, n. 9 (1980).

Neither are we persuaded by petitioner's argument that his position is supported by the fact that certain state racketeering statutes expressly provide for the forfeiture of "profits," "money," "interest or property," or "all property, real or personal," acquired from racketeering. Brief for Petitioner 8–9. Nearly all of the state statutes postdate the *Meyers* and *Thevis* District Court decisions. See, *e. g.*, Colo. Rev. Stat. § 18–17–106 (Supp. 1982) (enacted in 1981); R. I. Gen. Laws § 7–15–3 (Supp. 1982) (enacted in 1979). The legislatures of those States presumably employed language different from that of § 1963(a)(1) so as to avoid narrow interpretations of their laws along the lines of the narrow interpretations given the federal statute by the courts in *Meyers* and *Thevis*.

V

If it is necessary to turn to the legislative history of the RICO statute, one finds that that history does not reveal, as petitioner would have us hold, see Brief for Petitioner 11–21, a limited congressional intent.

The legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots. Congress' statement of findings and purpose in enacting Pub. L. 91–452, 84 Stat. 922, is set forth in its § 1. This statement dramatically describes the problem presented by organized crime. Congress declared, *id.*, at 923: "It is the purpose of this Act to seek the eradication of organized crime in the United States . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." This Court has recognized the significance of this statement of findings and purpose. *United States* v. *Turkette*, 452 U. S., at 588–589. Further, Congress directed, by § 904(a) of Pub. L. 91–452, 84 Stat. 947: "The provisions of this title shall be liberally construed to effectuate its remedial purposes." So far as we have been made aware, this is the only substantive federal criminal statute that contains such a directive; a similar provision, however, appears in the Criminal Appeals Act, 18 U. S. C. § 3731.

Congress emphasized the need to fashion new remedies in order to achieve its far-reaching objectives. See S. Rep. No. 91–617, p. 76 (1969).

> "What is needed here . . . are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts." *Id.*, at 79.

Senator Scott spoke of "new legal weapons," 116 Cong. Rec. 819 (1970), and Senator McClellan stressed the need for new penal remedies. *Id.*, at 591–592. Representative Poff, floor manager of the bill in the House, made similar observations. *Id.*, at 35193. Representative Rodino observed that "[d]rastic methods . . . are essential, and we must develop law enforcement measures at least as efficient as those of organized crime." *Id.*, at 35199. The RICO statute was viewed as one such "extraordinary" weapon. *Id.*, at 602 (remarks of Sen. Hruska). And the forfeiture provision was intended to serve all the aims of the RICO statute, namely, to "punish, deter, incapacitate, and . . . directly to remove the corrupting influence from the channels of commerce." *Id.*, at 18955 (remarks of Sen. McClellan).

The legislative history leaves no doubt that, in the view of Congress, the economic power of organized crime derived from its huge illegal profits. See Blakey, The RICO Civil Fraud Action in Context: Reflections on *Bennett* v. *Berg*, 58 Notre Dame L. Rev. 237, 249–256 (1982). Congress could not have hoped successfully to attack organized crime's economic roots without reaching racketeering profits. During the congressional debates, the sources and magnitude of organized crime's income were emphasized repeatedly. See, *e. g.*, 115 Cong. Rec. 5873, 5884–5885 (1969); 116 Cong. Rec. 590, 592 (1970) (remarks of Sen. McClellan). From all this, the intent to authorize forfeiture of racketeering profits seems obvious. H. R. Rep. No. 91–1549, p. 57 (1970), recites that the forfeiture provision extends to "all property and interests, as broadly defined, which are related to the violations."

It is true that Congress viewed the RICO statute in large part as a response to organized crime's infiltration of legitimate enterprises. *United States* v. *Turkette*, 452 U. S., at 591. But Congress' concerns were not limited to infiltration. The broader goal was to remove the profit from organized crime by separating the racketeer from his dishonest gains. Forfeiture of interest in an enterprise often would do little to deter; indeed, it might only encourage the speedy looting of an infiltrated company. It is unlikely that Congress intended to enact a forfeiture provision that provided an incentive for activity of this kind while authorizing forfeiture of an interest of little worth in a bankrupt shell.

We are not persuaded otherwise by the presence of a 1969 letter from the then Deputy Attorney General to Senator McClellan. See Measures Relating to Organized Crime: Hearings before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st

Cong., 1st Sess., 407 (1969). That letter, with its reference to "one's interest in the enterprise" does not indicate, for us, any congressional intent to preclude forfeiture of racketeering profits. The reference, indeed, is not to § 1963(a) as finally enacted but to an earlier version in which forfeiture was to be expressly limited to an interest in an enterprise. The letter was merely following the language of the then pending bill. Furthermore, the real purpose of the sentence was not to explain what the statutory provision meant, but to explain why the Department of Justice believed it was constitutional.

The rule of lenity, which this Court has recognized in certain situations of statutory ambiguity, see *United States* v. *Turkette*, 452 U. S., at 587, n. 10, has no application here. That rule "comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan* v. *United States*, 364 U. S. 587, 596 (1961). Here, the language of the RICO forfeiture provision is clear, and "the rule of lenity does not come into play." *United States* v. *Turkette*, 452 U. S., at 588, n. 10.

We therefore disagree with the reasoning of the respective courts in the *Marubeni*, *McManigal*, *Meyers*, and *Thevis* cases, and we affirm the judgment of the United States Court of Appeals for the Fifth Circuit.[3]

It is so ordered.

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[3] In our ruling today, we recognize that we have not resolved any ambiguity that might be inherent in the terms "profits" and "proceeds." Our use of those terms is not intended to suggest a particular means of calculating the precise amount that is subject to RICO forfeiture in any given case. We hold simply that the "interests" subject to forfeiture under § 1963(a)(1) are not limited to interests in an enterprise.

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY *v.* CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF VIRGINIA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 81-2332. Argued October 3, 1983—Decided November 1, 1983

Respondent Chesapeake & Potomac Telephone Co. of Virginia (C&P) was required to relocate some of its transmission facilities by reason of a street realignment resulting from federally funded urban renewal projects carried out in Norfolk, Va., by petitioner Norfolk Redevelopment and Housing Authority (NRHA), a political subdivision of the State. C&P sought reimbursement from NRHA for the expenses incurred in this relocation, claiming that it was a "displaced person" within the meaning of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Act), which provides in 42 U. S. C. § 4622(a)(1) that any person displaced from his home or place of business by a federal or federally funded project is entitled to relocation benefits, including reimbursement for the "actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property." After receiving administrative rejections, C&P sued NRHA in Federal District Court, which denied relief. The Court of Appeals reversed.

Held: C&P is not a "displaced person" within the meaning of the Act. The Act did not change the long-established common-law principle that a utility forced to relocate from a public right-of-way must do so at its own expense. An analysis of the Act—the purposes of which were to ensure that persons displaced by federal and federally funded programs would receive uniform treatment and would not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole—and of its legislative history, particularly as it relates to the relocation provisions of the Federal-Aid Highway Act of 1968 as a model for the provisions at issue here, shows that in passing the Act Congress addressed the needs of residential and business tenants and owners, and did not deal with the separate problem posed by the relocation of utility service lines. Pp. 34–43.

674 F. 2d 298, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which all other Members joined, except POWELL, J., who took no part in the consideration or decision of the case.

Francis N. Crenshaw argued the cause for petitioner. With him on the brief were *Howard W. Martin, Jr.*, and *Ann K. Sullivan.*

Joshua I. Schwartz argued the cause for the Secretary of Housing and Urban Development as respondent under this Court's Rule 19.6 in support of petitioner. With him on the brief were *Solicitor General Lee, Deputy Solicitor General Claiborne*, and *Geoffrey I. Stewart.*

Joseph L. Kelly argued the cause for respondent Chesapeake and Potomac Telephone Co. of Virginia. With him on the brief was *Jack E. Greer.*[*]

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Chesapeake & Potomac Telephone Co. of Virginia (C&P) was required to relocate some of its telephone transmission facilities by reason of a street realignment. It sought compensation from petitioner Norfolk Redevelopment and Housing Authority (NRHA), the local government agency responsible for the urban renewal plan which caused the street realignment. C&P claimed that it was a "displaced person" as that term is defined in the Uniform Relocation Act,[1] passed by Congress in 1970. We hold that C&P is not a "displaced person" within the meaning of the Act.

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[*] Briefs of *amici curiae* urging reversal were filed for the Boston Redevelopment Authority by *William A. Zucker;* for the Community Redevelopment Agencies of the City of Los Angeles et al. by *James Dexter Clark* and *Richard E. Brandt;* for the United States Conference of Mayors et al. by *Stephen Chapple, John J. Gunther, Bronson C. La Follette,* Attorney General of Wisconsin, and *Richard B. Geltman;* for the National Institute of Municipal Law Officers by *J. Lamar Shelley, John W. Witt, Henry W. Underhill, Jr., Benjamin L. Brown, Roy D. Bates, George Agnost, James B. Brennan, Roger F. Cutler, Walter M. Powell, Frederick A. O. Schwarz, Jr., William H. Taube, William I. Thornton, Jr., Max P. Zall,* and *Charles S. Rhyne;* for the City of New York by *Frederick A. O. Schwarz, Jr.,* and *Leonard Koerner;* and for the City of Norfolk, Virginia, by *Philip R. Trapani* and *Lydia Calvert Taylor.*

Briefs of *amici curiae* urging affirmance were filed for the American Gas Association by *Kevin B. Belford;* for Brooklyn Union Gas Co. by *Dana Contratto;* and for Mountain States Telephone and Telegraph Co. et al. by *Dale G. Higer.*

The Relocation Act provides that any person "displaced" from his home or place of business by a federal or federally funded project is entitled to relocation benefits, including reimbursement for the "actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property." 42 U. S. C. §4622(a)(1). The Act by its terms binds only federal agencies; but a federal agency may not provide funds for state projects involving condemnation without first receiving "satisfactory assurances" that displaced persons will be given such relocation payments and assistance "as are required to be provided by a Federal agency" under the Act. 42 U. S. C. §4630. In order to qualify for federal funds, therefore, many States, such as Virginia, see Va. Code §25-235 *et seq.* (1980 and Supp. 1983), have adopted legislation modeled on the Relocation Act.

NRHA is a political subdivision of the State of Virginia, located in the city of Norfolk. During the 1960's, NRHA began four redevelopment projects in Norfolk for which federal funds were provided under the urban renewal program contained in Title I of the Housing Act of 1949, 63 Stat. 414, 42 U. S. C. §1450 *et seq.* (1976 ed. and Supp. V).[2] The development plans approved by the city and carried out by

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[1] The full title of the Act is the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894, 42 U. S. C. §4601 *et seq.*

[2] Agreements were worked out between the United States Department of Housing and Urban Development (HUD) and NRHA for each of the four projects, providing that HUD would furnish two-thirds of the net project cost in cash, while the city of Norfolk would contribute the remaining one-third "in kind," by means of public improvements such as streets, schools, and parks. See Stipulation of Fact No. 9, App. 42-43; App. 187-188, 194 (testimony of Mr. Rice).

NRHA required the reshaping of certain land parcels, which in turn required a realignment of street patterns. After acquiring the land on both sides of the streets in question, NRHA successfully petitioned the city to close off those streets or parts thereof. Stipulations of Fact Nos. 5, 6, App. 39–41. New streets were constructed in accordance with the development plans.

C&P is a privately owned utility company engaged in the business of selling telephone and other telecommunication services in the city of Norfolk and throughout Virginia. To serve its customers, C&P had placed telephone transmission facilities, including manholes, conduits, cables, and accessory fittings, within the public rights-of-way of certain streets throughout Norfolk, including streets within the urban renewal project areas.[3] When the streets were realigned, C&P was forced to relocate some of its facilities. The manholes and conduits, too massive to move, were simply abandoned in place. The telephone cables were withdrawn and, for the most part, sold for their scrap value, though some cable was stored for possible reuse. App. 100–101 (testimony of Mr. Tucker). Substitute facilities were installed beneath the new streets to prevent any interruption in service.

C&P sought reimbursement from NRHA for the expenses it incurred in this relocation, claiming that it was a "displaced person" within the meaning of the Relocation Act.[4] After a

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[3] The facilities were placed under the streets pursuant to an 1898 franchise agreement between the city and C&P's predecessor, Southern Bell Telephone Co. See Exhibit No. 1, App. 228–243. Under the terms of that agreement, the city could require C&P to move its facilities at any time, with all expenses of the move to be borne by C&P. Stipulations of Fact Nos. 10, 11, App. 43–44.

[4] Section 101(6) of the Relocation Act, as set forth in 42 U. S. C. § 4601(6), provides as follows:

"The term 'displaced person' means any person who, on or after January 2, 1971, moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate series of administrative rejections, C&P sued NRHA in the United States District Court for the Eastern District of Virginia.[5] The District Court denied relief to C&P, but on appeal its decision was reversed by the Court of Appeals for the Fourth Circuit. *Chesapeake & Potomac Telephone Co. of Virginia* v. *Landrieu*, 674 F. 2d 298 (1982). That court held that the definitional provisions of the Relocation Act compelled the conclusion that a utility was not excluded from the definition of "displaced person" under the Act, and that C&P was entitled to compensation as a "displaced person" for the sort of expenses incurred here.

We granted certiorari to review the judgment of the Court of Appeals. 459 U. S. 1145 (1983). We now reverse. Our analysis of the statute and its legislative history convinces us that in passing the Relocation Act Congress addressed the needs of residential and business tenants and owners, and did not deal with the separate problem posed by the relocation of utility service lines. We hold, therefore, that the Relocation Act did not change the long-established common-law principle that a utility forced to relocate from a public right-of-way must do so at its own expense; it is not a "displaced person" as that term is defined in the Act.

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real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance; and solely for the purposes of sections 4622(a) and (b) and 4625 of this title, as a result of the acquisition of or as the result of the written order of the acquiring agency to vacate other real property, on which such person conducts a business or farm operation, for such program or project."

[5] After C&P was turned down by NRHA, it appealed to the Richmond office of HUD. That agency also rejected the claim and was joined as a defendant in this suit. The basis for C&P's appeal from the local agency to the federal agency is contained in a regulation issued by HUD, 24 CFR § 42.707 (1983). The statutory authorization for such appeal is unclear, but neither party questions the validity of the regulation in question, and we proceed on the assumption that such review by HUD was authorized by the Act, and that the present litigation involves only the interpretation of the relevant provisions of the Relocation Act.

There is no doubt that a utility company could, under certain circumstances, be a "displaced person" within the meaning of the Relocation Act. Businesses as well as natural persons are eligible for relocation benefits.[6] Thus, for example, if a branch office of C&P were located in a building condemned by the NRHA, C&P might well be entitled to recover the cost of moving its office equipment and furnishings. C&P, just like any other legitimate business, would be "displaced" by the federally funded project. But whether C&P can be said to be "displaced" within the meaning of the Act when it relocates telephone lines because an urban renewal project calls for realignment of existing street patterns is a different question which requires more detailed analysis. When streets containing utility conduits are realigned, C&P is not "just like any other legitimate business"; it faces a problem unique to utilities.

Under the traditional common-law rule, utilities have been required to bear the entire cost of relocating from a public right-of-way whenever requested to do so by state or local authorities. 12 E. McQuillin, Law of Municipal Corporations § 34.74a (3d ed. 1970); 4A J. Sackman, Nichols' Law of Eminent Domain § 15.22 (rev. 3d ed. 1981). This rule was recognized and approved by this Court as long ago as *New Orleans Gas Light Co.* v. *Drainage Comm'n of New Orleans*, 197 U. S. 453, 462 (1905) (holding that the injury sustained by the utility is *damnum absque injuria*).

It is a well-established principle of statutory construction that "[t]he common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose." *Fairfax's Devisee* v. *Hunter's Lessee*, 7

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[6] "Person" is defined in the Act to include "any individual, partnership, corporation, or association." 42 U. S. C. § 4601(5). The term "business" includes "any lawful activity, excepting a farm operation, conducted primarily . . . (B) for the sale of services to the public . . . ." 42 U. S. C. § 4601(7).

Cranch 603, 623 (1813).[7] Since the elements of the federal law of eminent domain are largely derived from the common law, see, *e. g.*, *United States* v. *Miller*, 317 U. S. 369 (1943), this canon of construction has a force in this case that it might not have in other contexts of federal statutory construction. We must, therefore, be satisfied that Congress addressed the problem of utility relocation costs in the Relocation Act before we can conclude that C&P is entitled to the benefits it seeks. "As in all cases of statutory construction, our task is to interpret the words of th[e] statut[e] in light of the purposes Congress sought to serve." *Chapman* v. *Houston Welfare Rights Org.*, 441 U. S. 600, 608 (1979).

The passage of the Relocation Act in 1970 ended a decade of close consideration of the problems faced by persons displaced by federal and federally funded projects. See *Alexander* v. *United States Dept. of HUD*, 441 U. S. 39, 49 (1979). The principal sponsor of the bill, Senator Muskie, noted that over 50 federal programs resulted in condemnation proceedings and that the victims of such proceedings received widely varying treatment. "Nearly all federally assisted programs have differing, if not conflicting, provisions for helping those displaced. They range from no assistance in some cases to liberal benefits and protection in others." 115 Cong. Rec. 31533 (1969). In part, the Uniform Relocation Act was passed, as its name suggests, simply to ensure uniform treatment of persons displaced by condemnation.[8]

Another, equally important, purpose of the Act was to ensure that persons displaced by federal and federally funded programs would "not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole." 42 U. S. C. § 4621. Under traditional concepts of eminent domain, a homeowner would receive only the market value of his condemned house. H. R. Rep. No. 91–1656, p. 8 (1970). A tenant at will, residing or doing business at condemned premises, received nothing. *Id.*, at 12. Yet both would incur significant, perhaps devastating, expenses in moving personal property. S. Rep. No. 91–488, pp. 6–7 (1969); H. R. Rep. No. 91–1656, *supra*, at 2–3. The Relocation Act was intended to alleviate the "disproportionate injuries" suffered by such persons.[9]

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[7] See also, *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U. S. 297, 304–305 (1959); *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 437 (1907); *Shaw* v. *Railroad Co.*, 101 U. S. 557, 565 (1880).

[8] See 42 U. S. C. § 4621 (statement of purpose); S. Rep. No. 91–488, pp. 1–8 (1969); H. R. Rep. No. 91–1656, pp. 1–3 (1970).

In pursuit of both equity and uniformity, Congress relied heavily on prior legislation governing specific federal programs. For the relocation provisions at issue here, Congress adopted as its principal model the relocation provisions in § 501 through § 511 of the Federal-Aid Highway Act of 1968 (1968 Highway Act), Pub. L. 90–495, 82 Stat. 830–835. The legislative history is explicit that the Relocation Act was designed to extend the coverage of that pre-existing program to all federal agencies, with modifications "only as necessary to achieve a system of requirements and aids that can be applied uniformly in all Federal and federally assisted programs." S. Rep. No. 91–488, *supra*, at 2. See also H. R. Rep. No. 91–1656, *supra*, at 2; 115 Cong. Rec. 31534 (1969) (remarks of Sen. Mundt).[10] Much of the language of the

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[9] See S. Rep. No. 91–488, *supra*, at 4, 6–7, 9; H. R. Rep. No. 91–1656, *supra*, at 3

[10] The same sources also indicate reliance on § 114 of the Housing Act of 1949, as amended by the Housing and Urban Development Act of 1968, Pub. L. 90–448, 82 Stat. 526. Section 114 made no mention of utility relocation costs, and HUD regulations promulgated under the Act specifically state that utilities have no right to reimbursement for expenses incurred when relocating to accommodate an urban renewal project. If, however, state law *requires* that such compensation be paid to the utility by the state or local agency involved in the project, then the amount paid is considered a legitimate project expenditure to which HUD will contribute its pro rata share. See HUD Urban Renewal Handbook, RHA 7209.1, ch. 2, pp. 4–5 (1969).

Section 114 was repealed by § 220(a)(5) of the Relocation Act, and HUD regulations have been extensively revised to reflect the new law. The regulation governing utility relocation costs, however, remains unchanged.

Relocation Act, including the declaration of policy,[11] the definitions of "person,"[12] "business,"[13] and "displaced person,"[14] as well as the formula for calculating relocation benefits,[15] is taken directly from the 1968 Highway Act.

In divining congressional intent, therefore, it is instructive to note that the claims made by C&P in this case would not have been countenanced under the 1968 Highway Act. Utility relocation costs necessitated by federally funded highway projects were already specifically governed by a separate provision, 23 U. S. C. § 123, which predated and was left intact by the 1968 Act. Careful consideration of this provision demonstrates that Congress considered utility relocation as a problem separate and distinct from the plight of "displaced" persons dealt with in the 1968 Highway Act and later, more generally, in the Relocation Act.

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[11] Compare § 501 of the 1968 Highway Act ("to insure that a few individuals do not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole") with § 201 of the Relocation Act, 42 U. S. C. § 4621 ("to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of Federal and federally assisted programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole").

[12] Compare § 511(1) of the 1968 Highway Act ("The term 'person' means . . . any individual, partnership, corporation, or association which is the owner of a business . . .") with § 101(5) of the Relocation Act, 42 U. S. C. § 4601(5), set out in n. 6, *supra*.

[13] Compare § 511(4) of the 1968 Highway Act ("The term 'business' means any lawful activity conducted primarily . . . (B) for the sale of services to the public . . .") with § 101(7) of the Relocation Act, 42 U. S. C. § 4601(7), set out in n. 6, *supra*.

[14] Compare § 511(3) of the 1968 Highway Act ("any person who moves from real property . . . as a result of the acquisition or reasonable expectation of acquisition of such real property, which is subsequently acquired, in whole or in part, for a Federal-aid highway . . .") with § 101(6) of the Relocation Act, 42 U. S. C. § 4601(6), set out in n. 4, *supra*.

[15] Compare § 505(a) of the 1968 Highway Act ("actual reasonable expenses in moving himself, his family, his business, or his farm operation, including personal property") with § 202(a)(1) of the Relocation Act, 42 U. S. C. § 4622(a)(1) ("actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property").

Title 23 U. S. C. § 123 had its origins in S. Rep. No. 1093, 83d Cong., 2d Sess., 12–13 (1954). In 1954, the Senate Committee on Public Works "heard considerable testimony from owners and operators of various public utilities concerning the heavy financial burden placed upon them when reconstruction or modernization of highways requires that their facilities be moved from their prior locations on the highway right-of-way." *Id.*, at 12. But the Committee tentatively concluded that, since the question was governed by long-established state law, it was "neither feasible nor desirable for the Federal Government to give direction to those local relationships by force of application of Federal funds." *Id.*, at 13.

The Committee did, however, authorize a study of the problem, and this study[16] led to the adoption of § 111 of the Federal-Aid Highway Act of 1956 (1956 Highway Act), Pub. L. 84–627, 70 Stat. 383. Some States had, by statute or practice, altered the common law in order to reimburse utilities for the costs of relocation. Congress felt that such reimbursement should be considered a legitimate project expense for which the Federal Government would contribute its pro rata share. Thus, § 111 provided that when a State, in accordance with state law, pays the costs of relocation of a utility necessitated by a federally funded highway project, "Federal funds may be used to reimburse the State for such cost in the same proportion as Federal funds are expended on the project." 23 U. S. C. § 123(a). The question of utility reimbursement was, thus, left to the laws of the individual States, with no congressional displacement of those laws. The House Report accompanying the 1956 Highway Act specifically stressed: "There is no requirement in this section, either expressed or implied, that a State must pay all or any part of utility relocation costs." H. R. Rep. No. 2022, 84th Cong., 2d Sess., 14 (1956).

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[16] Public Utility Relocation Incident to Highway Improvement, H. R. Doc. No. 127, 84th Cong., 1st Sess. (1955).

In response to the 1956 Highway Act, a number of States passed legislation providing for reimbursement of the cost of relocating utility facilities for federal-aid highway projects.[17] The Senate Committee on Public Works expressed concern over "this drastic change in existing practices," noting that "the use of Federal funds for reimbursement to the States for this purpose will increase substantially, thereby reducing the amount of Federal funds available for construction of highways." S. Rep. No. 1407, 85th Cong., 2d Sess., 28 (1958). In response, the Committee proposed to put a 70% cap on federal contributions to States for reimbursement of utilities. *Ibid.* This limitation was rejected in the final bill, however, and the only amendment to 23 U. S. C. § 123 was a proviso that reimbursement be made "only after evidence satisfactory to the Secretary shall have been presented to him substantiating the fact that the State has paid such cost from its own funds . . . ." Pub. L. 85–381, § 11(a), 72 Stat. 94–95. Thus, after careful consideration of the alternatives, the relations between utilities and the States were left, once again, to state law. No *federal* right to reimbursement was ever granted to utilities, although pro rata federal reimbursement remained available to the States if state law required reimbursement of utilities.

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[17] "During 1956 and 1957, legislation which would provide for payment by the State of the cost of relocating public-utility facilities was considered by the legislative assemblies in 40 States. Such legislation was passed in 22 States, but was vetoed in 6 States, so it became law in 16 States. Under these 16 State laws only 1 State will pay the cost of relocating utility facilities on all State-maintained highways, 5 relate to all Federal-aid projects, and 10 relate to the projects on the Interstate System only, where the Federal share of the cost is at least 90 percent." S. Rep. No. 1407, 85th Cong., 2d Sess., 28 (1958).

As noted, the 1968 Highway Act did nothing to change this situation. Title 23 U. S. C. § 123 was left untouched. The relocation provisions in § 501 through § 511 of the 1968 Act were directed at a separate problem: the plight of those displaced from their homes or places of business. H. R. Rep. No. 1584, 90th Cong., 2d Sess., 20 (1968); S. Rep. No. 1340, 90th Cong., 2d Sess., 7 (1968). Utility relocation costs were never mentioned and, given 23 U. S. C. § 123, were clearly not intended to be covered by § 501 through § 511.

The history of the Federal-Aid Highway Act from 1954 to 1968 shows, therefore, that Congress considered utility relocation costs and the expenses incurred by "displaced persons" to be separate and distinct problems calling for separate and distinct solutions. Congress showed that it was aware of the common-law rule that utilities must bear their own relocation expenses, and it proved unwilling, after extensive consideration and debate, to federalize the relations between utilities and state and local governments.

In the Relocation Act, Congress chose to deal with only one of these two problems. In modifying and extending § 501 through § 511 of the 1968 Highway Act, Congress was addressing the needs of residential and business tenants and owners, living and working in buildings that would be bulldozed by federal and federally funded programs. 115 Cong. Rec. 31533 (1969) (remarks of Sen. Muskie) (expressing his concern at "the bulldozing of hundreds of thousands of people from their homes and businesses annually").[18] Section 220 of the Relocation Act repealed those sections of prior law that had been superseded or rendered superfluous by the Relocation Act, including § 501 through § 511 of the 1968 Highway

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[18] See also S. Rep. No. 91–488, pp. 4, 6, 9 (1969); H. R. Rep. No. 91–1656, pp. 2–3 (1970); 115 Cong. Rec. 31534 (1969) (remarks of Sen. Mundt); *id.*, at 31534–31535 (remarks of Sen. Tydings); 116 Cong. Rec. 40167 (1970) (remarks of Rep. Edmondson); *id.*, at 40168 (remarks of Rep. Kluczynski); *id.*, at 40170 (remarks of Rep. Mink).

Act. See H. R. Rep. No. 91-1656, pp. 21, 32-38 (1970). Yet 23 U. S. C. § 123, governing utility relocation costs occasioned by federally funded highway projects, was left intact. It was neither contradicted nor rendered superfluous because it addressed a problem outside the scope of the Relocation Act.

At no point in the extensive hearings,[19] congressional debates,[20] or Committee Reports[21] was it ever suggested that the Relocation Act would alter the state rules governing utility relocation expenses. Given that Congress had hitherto expressly declined to alter those rules, after extensive consideration and debate, the conclusion seems inescapable that Congress did not do so in a fit of absentmindedness when it modified and extended the provisions of the 1968 Highway Act, provisions directed at a different problem.

Virginia has continuously recognized the common-law rule that a utility forced to relocate from a public right-of-way must do so at its own expense. In *Potomac Electric Power Co.* v. *Fugate*, 211 Va. 745, 747-748, 180 S. E. 2d 657, 658-659 (1971), the Supreme Court of Virginia held that a franchise agreement, such as that between Norfolk and C&P, which allows a utility to place its facilities in public streets is revocable at will and confers no property right on the utility. Established practice under the franchise agreement between Norfolk and C&P was to the same effect. C&P has always in the past borne all costs of relocation and has included those expenses as part of its operating expenses within the rate structure approved by the State Corporation Commission. Stipulations of Fact Nos. 10, 11, App. 43–44. We hold that the Relocation Act did not grant utilities such as C&P a new, federal right to reimbursement for expenses of the sort incurred here.

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[19] See Uniform Relocation Assistance and Land Acquisition Policies Act of 1969: Hearings on S. 1 before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 91st Cong., 1st Sess. (1969); Uniform Relocation Assistance and Land Acquisition Policies-1970: Hearings on H. R. 14898, H. R. 14899, S. 1, and related bills before the House Committee on Public Works, 91st Cong., 1st and 2d Sess. (1969-1970).

[20] See, *e. g.*, 115 Cong. Rec. 31533-31535 (1969); 116 Cong. Rec. 40163-40172, 42132-42140 (1970).

[21] S. Rep. No. 91-488 (1969); H. R. Rep. No. 91-1656 (1970).

The judgment of the Court of Appeals is

Reversed.

JUSTICE POWELL took no part in the consideration or decision of this case.

TORRES-VALENCIA *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82–6848. Decided November 7, 1983

Held: The Court of Appeals' judgment is vacated, and the case is remanded, since both the Government's concession in its brief opposing the petition for certiorari that the District Court erroneously refused to give petitioner's character evidence instruction to the jury and its contention in this Court that the error was harmless should be presented to the Court of Appeals in the first instance.

Certiorari granted; vacated and remanded.

PER CURIAM.

In its brief opposing the petition for certiorari, the Government concedes that the District Court erroneously refused to give petitioner's character evidence instruction to the jury, but argues that the error was harmless. The Government's concession of error, as well as its harmless-error argument, should be presented to the Court of Appeals in the first instance. The motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted, the judgment of the Court of Appeals is vacated, and the case is remanded to the Court of Appeals for consideration of the Government's concession of error.

It is so ordered.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

This Court can only deal with a certain number of cases on the merits in any given Term, and therefore some judgment must attend the process of selection. Summary disposition is of course appropriate where a lower court has demonstrably misapplied our cases in a manner which has led to an incorrect result. Here, however, the Court chooses to summarily vacate a judgment of the Court of Appeals affirming petitioner's conviction on the ground that the Government concedes that the District Court improperly failed to give an instruction tendered by petitioner. It is also conceded that petitioner fully argued to the jury his theory of the case, notwithstanding the District Court's refusal to give his proffered instruction.

I had thought the days of parsing a trial record to find isolated instructional errors in a charge to the jury were long gone. Title 28 U. S. C. § 2111 provides:

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

I am confident that the Court of Appeals for the Ninth Circuit in deciding this case was well aware of this provision—indeed, perhaps better aware of it than is this Court.

MAGGIO, WARDEN *v.* WILLIAMS

ON APPLICATION TO VACATE STAY

No. A-301. Decided November 7, 1983

Respondent's state-court murder conviction and death sentence were affirmed by the Louisiana Supreme Court, and this Court denied his petition for certiorari and request for rehearing. After he unsuccessfully sought habeas corpus relief in the state courts, respondent filed his first federal-court petition for habeas corpus presenting the same issues that had proved unavailing in the state courts. The District Court denied the petition, the Court of Appeals affirmed, and this Court again denied certiorari and a request for a rehearing. Respondent unsuccessfully renewed his attempt to win relief in the state courts, and then filed a second petition for habeas corpus in the District Court, raising two claims that had previously been rejected and two additional claims. The court refused to grant the writ or to stay respondent's execution. The Court of Appeals affirmed the judgment—finding respondent's claims to be without merit—but issued a stay of execution pending either this Court's anticipated review of the law concerning state-court procedures for review of the "proportionality" of death sentences, or this Court's "further directions."

Held: The stay was improvidently entered by the Court of Appeals. The standard for determining whether a court of appeals' stay pending disposition of a petition for certiorari should continue in effect, is whether there exists a reasonable probability that four Members of this Court will consider the underlying issue sufficiently meritorious for the grant of certiorari. None of respondent's claims—challenging the constitutionality of (1) the Louisiana Supreme Court's review of the proportionality of his death sentence on a districtwide rather than a statewide basis, (2) the prosecutor's closing argument, (3) the trial court's instruction on lesser offenses, and (4) the exclusion for cause of certain veniremen, thus depriving respondent of a "representative" jury—warrant certiorari and plenary consideration. The arguments that respondent raised for the first time in these proceedings are insubstantial, and the arguments that he has attempted to relitigate are no more persuasive now than they were when they were first rejected.

Application to vacate stay granted.

PER CURIAM.

On October 23, 1983, less than two days before Williams' scheduled execution, the Court of Appeals for the Fifth

Circuit stayed the execution "pending final action of the Supreme Court." Because we agree with applicant that the stay was improvidently imposed, we grant his motion to vacate the stay and to allow the State to reschedule Williams' execution.

I

Williams was sentenced to death for killing a security guard while robbing a grocery store in Baton Rouge, La. His conviction and sentence were affirmed by the Louisiana Supreme Court. *State* v. *Williams*, 383 So. 2d 369 (1980). After we denied Williams' petition for certiorari, 449 U. S. 1103 (1981), and his request for rehearing, 450 U. S. 971 (1981), he unsuccessfully sought a writ of habeas corpus in the Louisiana state courts. He then filed his first petition for habeas corpus in the District Court for the Middle District of Louisiana, presenting the same 13 issues that had proved unavailing in the state courts. The District Court held no hearing, but issued a written opinion denying Williams' petition. See *Williams* v. *Blackburn*, 649 F. 2d 1019, 1021–1026 (CA5 1981) (incorporating District Court's decision). The District Court's judgment was affirmed by a panel of the Court of Appeals for the Fifth Circuit, *ibid.*, but an order was entered directing that the appeal be reheard en banc. On rehearing, the en banc Court of Appeals rejected each of Williams' many objections to his conviction and sentence and affirmed the judgment of the District Court. *Williams* v. *Maggio*, 679 F. 2d 381 (1982) (en banc). On June 27, 1983, we again denied Williams' petition for certiorari, 463 U. S. 1214, and we denied his request for rehearing on September 8, 1983, 463 U. S. 1249.

After unsuccessfully renewing his attempt to win relief in the state courts, Williams filed a second petition for habeas corpus in the District Court, raising two claims that had previously been rejected and two additional claims. The District Court issued a detailed opinion in which it refused to grant the writ or to stay Williams' execution. *Williams* v. *King*, 573 F. Supp. 525 (1983). Because it believed Williams' contentions to be "frivolous and without merit," the District Court also denied his request for a certificate of probable cause, which, under 28 U. S. C. § 2253, is a prerequisite to an appeal. The Fifth Circuit granted a certificate of probable cause and affirmed the judgment of the District Court, but nevertheless issued a stay. The court reviewed Williams' claims and "expressly [found] that each is without merit." *Williams* v. *King*, 719 F. 2d 730, 733 (1983). In light of recent actions by this Court, however, the Court of Appeals concluded with respect to Williams' "proportionality" claim that "a complete review of the law on this matter may be anticipated. With a person's life at stake, we must await that review or further directions from the Supreme Court." *Ibid.*

II

Just last Term, we made clear that we would not automatically grant stays of execution in cases where the Court of Appeals had denied a writ of habeas corpus. *Barefoot* v. *Estelle*, 463 U. S. 880, 895 (1983). A stay application addressed to a Circuit Justice or to the Court will be granted only if there exists "'a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction.'" *White* v. *Florida*, 458 U. S. 1301, 1302 (1982) (POWELL, J., in chambers) (quoting *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U. S. 1301, 1305 (1974) (POWELL, J., in chambers)). We perceive no reason to apply a different standard in determining whether a stay granted by a Court of Appeals pending disposition of a petition for certiorari to this Court should continue in effect.

The grounds on which Williams would request certiorari are amply evident from his opposition to the motion to vacate the stay, his voluminous filings in the lower courts, and the opinions and proceedings in the District Court and Court of Appeals. None of these claims warrant certiorari and plenary consideration in this case. Accordingly, we conclude that the stay, which the Court of Appeals apparently granted in view of the possibility that we would disagree with its analysis of the constitutional issues raised by Williams, should be vacated.

Williams' claims may be summarized briefly. He argues, first, that the Louisiana Supreme Court reviewed the proportionality of his death sentence on a districtwide rather than a statewide basis, and that such review does not adequately ensure that his death sentence has been imposed in a rational and nonarbitrary manner. Second, the prosecutor's closing argument allegedly prejudiced the jury against Williams and elicited a decision based on passion rather than reason. Third, the trial court's instruction on lesser offenses, given despite the absence of evidence warranting such an instruction, is claimed to have violated the rule established in *Hopper* v. *Evans*, 456 U. S. 605 (1982), and to have denied Williams due process. Fourth, the exclusion for cause of three veniremen who opposed the death penalty at the guilt-innocence phase of Williams' trial, although proper under *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), allegedly deprived Williams of a jury representative of a fair cross-section of the community.

Williams' second, third, and fourth contentions warrant little discussion. As Williams made clear in his second petition for state habeas corpus, he challenged the prosecutor's closing argument, either directly or indirectly, in his first state habeas proceeding. The Louisiana Supreme Court ultimately rejected his challenge, although two justices indicated that the prosecutor's statements raised a substantial question and one concluded that the statements constituted reversible error. *State ex rel. Williams* v. *Blackburn*, 396 So. 2d 1249 (1981). Williams' failure to raise this claim in his first federal habeas proceeding is inexcusable, but the District Court nevertheless gave it full consideration in the second federal habeas proceeding. Applying the standard established in *Donnelly* v. *DeChristoforo*, 416 U. S. 637 (1974), the District

Court examined the prosecutor's closing argument at length and concluded that it did not render Williams' trial fundamentally unfair.

The trial court's instruction on lesser offenses was clearly proper under state law, and the District Court's review of the record led it to conclude that the evidence fully justified the trial court's charge.

Williams' challenge to the exclusion for cause of certain veniremen was previously rejected by the Fifth Circuit and was presented to this Court in his petitions for certiorari and his motion for rehearing following the denial of his second petition. He has now recast his argument as an attack on the representativeness of the jury that convicted him. In *Witherspoon*, we found the extant evidence insufficient to demonstrate that "the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction." 391 U. S., at 518. Williams claims that he is entitled to a hearing on the question whether the jury selection procedures followed here had these effects. But he has not alleged that veniremen were excluded for cause on any broader basis than authorized in *Witherspoon*. The District Court characterized the evidence proffered by Williams on the question whether the jury was less than neutral with respect to guilt as tentative and fragmentary, and we cannot conclude that it abused its discretion in refusing to hold an evidentiary hearing on this issue. Further review is not warranted.

Williams' challenge to the Louisiana Supreme Court's proportionality review also does not warrant the issuance of a writ of certiorari. The en banc Fifth Circuit has carefully examined the Louisiana Supreme Court's procedure and found that it "provides adequate safeguards against freakish imposition of capital punishment." *Williams* v. *Maggio*, 679 F. 2d, at 395. This conclusion was challenged in this Court in Williams' petition for certiorari following the Court of Appeals' decision and in his motion for reconsideration of our denial of that petition. We were, of course, fully aware at that time that we had agreed to decide whether some form of comparative proportionality review is constitutionally required. See *Pulley* v. *Harris*, 460 U. S. 1036 (1983).

Since agreeing to decide this issue in *Pulley*, the Court has consistently denied challenges to the Louisiana Supreme Court's proportionality review scheme that were identical to that raised by Williams. See *Lindsey* v. *Louisiana*, *post*, p. 908; *James* v. *Louisiana*, *post*, p. 908; *Sonnier* v. *Louisiana*, 463 U. S. 1229, rehearing denied, 463 U. S. 1249 (1983). See also *Narcisse* v. *Louisiana*, *post*, p. 865. Williams asserts that his execution should be stayed because we have issued a stay in another Louisiana death case, *Baldwin* v. *Maggio*, 463 U. S. 1251 (1983). But our decision there turned not on the substantiality of applicant's *Pulley* argument, but on the fact that applicant raised a substantial challenge to the effectiveness of his trial counsel, similar to those we shall resolve in two cases set for argument this Term. *Strickland* v. *Washington*, 462 U. S. 1105 (1983); *United States* v. *Cronic*, 459 U. S. 1199 (1983).

As Williams notes, JUSTICE WHITE recently granted a stay in a case raising a proportionality challenge to a death sentence imposed in Texas. *Autry* v. *Estelle*, *post*, p. 1301. Also, on October 31, the Court declined to vacate that stay. *Post*, p. 925. In that case, however, the Texas Court of Criminal Appeals, like the California Supreme Court in *Pulley*, had wholly failed to compare applicant's case with other cases to determine whether his death sentence was disproportionate to the punishment imposed on others. Under those circumstances, it was reasonable to conclude that Autry's execution should be stayed pending the decision in *Pulley*, or until further order of the Court.

That is not the case here. Our prior actions are ample evidence that we do not believe that the challenge to districtwide, rather than statewide, proportionality review is an issue warranting a grant of certiorari. Our view remains the same. Nor did Williams convince the lower courts that he might have been prejudiced by the Louisiana Supreme Court's decision to review only cases from the judicial district in which he was convicted. Indeed, the District Court examined every published opinion of the Louisiana Supreme Court affirming a death sentence and concluded that Williams' sentence was not disproportionate regardless of whether the review was conducted on a districtwide or statewide basis. We see no reason to disturb that judgment. Finally, Williams has not shown, nor could he, that the penalty imposed was disproportionate to the crimes he was convicted of committing.

III

The District Court's careful opinion was fully reviewed by the Court of Appeals, which found no basis for upsetting the District Court's conclusion that Williams' contentions were meritless. The arguments that Williams raised for the first time in these proceedings are insubstantial, and the arguments that he has attempted to relitigate are no more persuasive now than they were when we first rejected them. We conclude, therefore, that the stay entered by the Court of Appeals should be vacated.

It is so ordered.

JUSTICE STEVENS, concurring in the judgment.

In my opinion the application to vacate the stay raises a serious question about the propriety of the prosecutor's argument to the jury at the sentencing phase of respondent's trial. In that argument the prosecutor sought to minimize the jury's responsibility for imposing a death sentence by implying that the verdict was merely a threshold determination that would be corrected by the appellate courts if it were not the proper sentence for this offender. I quote some of that argument:

"I want to read you some laws because something they [the defense] said, don't sentence this man to death, don't kill this man. You see, you have the last word on the verdict, and it but, by far you don't have the last word on it if you return it. The Louisiana Supreme Court has enacted a series of statutes that I want to read to you. What happens if you return a death penalty in this case. Because the law that's set up is very exacting, detailed and complicated procedure for a review of this court, the Louisiana Supreme Court, and other courts before any death penalty can be imposed. The law states, 905.9, Review on Appeal, The Supreme Court of Louisiana shall review of every sentence of death to determine if it is excessive. The Court, by rule, shall establish such procedures as necessary to satisfy constitutional criteria for review. And, then the statute, they enact it. See, not necessarily, it's mandatory that the Supreme Court review it. There's seven judges on the Supreme Court. The highest judges in this state. For it to be upheld, four of them will have to approve it. Well, what do they review? They state that every sentence of death shall be reviewed by this court to determine if it is excessive, and in determining whether the sentence is excessive, the court shall determine. A. Whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors. If they decide it was, they can reverse it and order a life sentence to be imposed. Whether the evidence supports the jury's findings of a statutory aggravating circumstance. If they find it didn't, they can reverse it and order a life sentence. Where the sentence is disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. If they don't think the crime was heinous enough, they can reverse it and order a life sentence. If they don't think this defendant—if they think the crime was hei-

> nous enough and the statutory circumstances were proved but they don't think it ought to be applied to this defendant, they can reverse it and order a life sentence. Whenever the death penalty is imposed, a verbation *[sic]* transcript of the sentence hearing along with the record required on appeal shall be transferred to the Court. *They review everything that went on in this trial.* . . . And there is a total and complete investigation done on the defendant to determine whether or not they will let your decision to impose the death penalty stand. And only then does it make it through the Louisiana State Supreme Court, and the defendant has a right, if he wishes—I'm not saying that it's granted in every case. It could be denied. It could be appealed all the way through the United States Supreme Court.
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> . . . . .
>
> "But more important, what is this verdict going to mean? *You see, you represent a certain segment of our society, law abiding people, raising families, working for a living, not robbing stores. You're the people that set the standards in this community. The Justices of the Supreme Court will review, and determine their decision whether or not if you decide to give him the death penalty, whether or not you were correct or not,* but you see,—it use *[sic]* to be one." Tr. 290–292, 296 (emphasis supplied).

In my view, this argument encouraged the jury to err on the side of imposing the death sentence in order to "send a message" since such an error would be corrected on appeal (while a life sentence could not). I do not believe that argument accurately described the function of appellate review in Louisiana. The Louisiana Supreme Court does not review "everything" that occurred during the trial. If it finds that one aggravating factor supported the jury's verdict, it will not consider the defendant's claim that the jury improperly relied upon other aggravating factors in reaching its verdict. See *State* v. *James*, 431 So. 2d 399, 405–406 (La.), cert. denied, *post*, p. 908. That rule was applied by the Louisiana Supreme Court in this very case. See *State* v. *Williams*, 383 So. 2d 369, 374 (La. 1980), cert. denied, 449 U. S. 1103 (1981). While that limitation on appellate review is constitutionally permissible in the context of Louisiana's death penalty statute, see *Zant* v. *Stephens*, 462 U. S. 862 (1983), given the state-law premises of Louisiana's capital punishment scheme, see *James*, *supra*, at 406, it certainly is a more limited form of appellate review than that described by the prosecutor.

In my opinion, the argument was prejudicial to the accused, both because it appears to have misstated the law and because it may have led the jury to discount its grave responsibility in determining the defendant's fate. A prosecutor should never invite a jury to err because the error may be corrected on appeal. That is especially true when the death penalty is at stake.

Nevertheless, because the essence of this issue was raised in prior proceedings questioning the competency of trial counsel—who failed to object to the argument when it was made—the Court is justified in applying a strict standard of review to this second federal habeas corpus application. See *Sanders* v. *United States*, 373 U. S. 1, 15–17 (1963). I do not find an adequate justification for respondent's failure to raise this argument in his earlier federal habeas action. Since respondent did raise the related argument of ineffectiveness of counsel, he was no doubt aware of this argument and may have deliberately chosen not to raise it in the first habeas corpus petition. See *Barefoot* v. *Estelle*, 463 U. S. 880, 895 (1983); *Rose* v. *Lundy*, 455 U. S. 509, 520–521 (1982) (plurality opinion); *Fay* v. *Noia*, 372 U. S. 391, 438–440 (1963); *Townsend* v. *Sain*, 372 U. S. 293, 317 (1963). Moreover, since competent counsel failed to object to the argument at the trial itself, thereby failing to avail himself of the usual procedure for challenging this type of constitutional error, I question whether it can be said that this trial was fundamentally unfair. See *Rose* v. *Lundy*, *supra*, at 543, and n. 8 (STEVENS, J., dissenting). Accordingly, though not without misgivings, I concur in the Court's decision to vacate the stay.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Before the Court is an application, filed by Ross Maggio, Warden of the Louisiana State Penitentiary, to vacate a stay of execution granted by the United States Court of Appeals for the Fifth Circuit.[1] Because the condemned, Robert Wayne Williams, has raised a substantial constitutional claim relating to the proportionality review undertaken by the Supreme Court of Louisiana when it affirmed his death sentence, I would deny the application. Moreover, because the Court's approach to this case displays an unseemly and unjustified eagerness to allow the State to proceed with Williams' execution, I dissent.

I

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would deny the Warden's application to vacate the stay of execution granted by the Court of Appeals.

II

Even if I accepted the prevailing view that the death penalty may constitutionally be imposed under certain circumstances, I would deny the application in this case because

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[1] See *Williams* v. *King*, 719 F. 2d 730 (CA5 1983). Prior to the action of the Court of Appeals, the execution of Williams had been set for between 12 p. m. and 3 a. m. on Tuesday, October 25, 1983.

Williams has raised a substantial constitutional claim concerning the disproportionate nature of his sentence.

This afternoon, the Court will hear oral argument in *Pulley* v. *Harris*, No. 82–1095, to consider whether the Constitution requires, prior to the execution of any death sentence, that a court of statewide jurisdiction determine whether a death sentence is proportional to the crime committed in light of the sentences received by similarly charged and convicted defendants in the State. Specifically, the questions presented to the Court for review are (1) whether the Constitution requires any proportionality review by a court of statewide jurisdiction prior to the execution of a state death sentence and (2) if so, whether the Constitution requires that such review assume any particular focus, scope, or procedural structure. Williams maintains that the order of the Court of Appeals staying his execution should be allowed to stand pending this Court's plenary consideration and disposition of the issues raised in *Pulley*. There is simply no defensible basis for disagreeing with him.

His common-sense position rests on several related arguments. Initially, it is beyond dispute that the constitutional status of proportionality review is currently unclear. That is undoubtedly why the Court granted the petition for a writ of certiorari in *Pulley*. See 460 U. S. 1036 (1983). It is also why JUSTICE WHITE, just last month, stayed the execution of James David Autry pending our decision in *Pulley*. See *Autry* v. *Estelle*, *post*, p. 1301 (in chambers). See also *infra*, at 62. Given this uncertainty, it seems grossly inappropriate to allow an execution to take place at this time if the condemned prisoner raises a nonfrivolous argument relating to the proportionality of his sentence. And in this case, Williams has raised at least two nonfrivolous, and indeed substantial, claims concerning the proportionality of his death sentence.

First, Williams contends that the Supreme Court of Louisiana has denied him due process of law by undertaking only a districtwide or parishwide proportionality review in his case. See *State* v. *Williams*, 383 So. 2d 369, 374–375 (1980), cert. denied, 449 U. S. 1103 (1981). He properly notes that prior opinions of this Court have suggested that statewide proportionality review is required before any constitutional death sentence may be carried out. See, *e. g.*, *Gregg* v. *Georgia*, 428 U. S., at 198, 204–206 (opinion of Stewart, POWELL, and STEVENS, JJ.) (approving death penalty in Georgia where appellate court examines whether the same sentence has been imposed "'in similar cases throughout the state'"); *id.*, at 223 (opinion of WHITE, J.) (noting with approval that the State Supreme Court vacates the death sentence "whenever juries across the State impose it only rarely for the type of crime in question").[2] Given that the necessary scope of any required proportionality review is among the questions presented in *Pulley*, any uncertainty concerning the continuing validity of these prior statements will presumably be answered by our decision in that case. The execution of a condemned prisoner raising a nonfrivolous claim on this particular issue prior to the release of that decision belies our boast to be a civilized society.[3]

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[2] See also *Proffitt* v. *Florida*, 428 U. S. 242, 258–260 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.) (approving death penalty in Florida where appellate review is done "by a court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality" in the imposition of the penalty); *Jurek* v. *Texas*, 428 U. S. 262, 276 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.); *Zant* v. *Stephens*, 462 U. S. 862, 879–880, 890, and n. 19 (1983).

[3] The Court does not conclude that Williams' challenge to the districtwide proportionality review undertaken by the State Supreme Court is a frivolous or even a nonsubstantial claim. Indeed, at least one justice of the Supreme Court of Louisiana has argued that the limited scope of such review does not satisfy federal constitutional standards. See *State* v. *Prejean*, 379 So. 2d 240, 249–252 (La. 1979) (Dennis, J., dissenting from denial of rehearing).

Rather, the Court concludes that the challenge does not present "an issue warranting a grant of certiorari." See *ante*, at 52. But as noted above, the Court has already granted a petition for certiorari in *Pulley* that

Second, even if a proportionality review limited to a single judicial district might eventually be held to pass constitutional muster, Williams notes that recent decisions of the Supreme Court of Louisiana have randomly applied proportionality reviews that are statewide in scope. See, *e. g.*, *State* v. *Moore*, 432 So. 2d 209, 225–228 (1983) (limited comparison of first-degree murder cases statewide); *State* v. *Narcisse*, 426 So. 2d 118, 138–139 (1983) (similar comparison between several districts rather than the customary one). The state court's failure to adopt any consistent approach in its review of capital cases, combined with its failure to offer any reasons for these different approaches, suggests that his death sentence has been imposed in a capricious and arbitrary manner. Again, at least until this Court clarifies the need for, and potential scope of, proportionality review in *Pulley*, I find it startling that the Court should allow this execution to take place.

A simple examination of the proportionality review that was undertaken in this case demonstrates its inadequacy.[4]

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poses a question concerning the constitutionally required scope of any proportionality review. Therefore, the Court's conclusion that the claim raised by Williams is not worthy of review is directly contradicted by the Court's previous actions in *Pulley*. See also *Baldwin* v. *Maggio*, 704 F. 2d 1325, 1326, n. 1 (CA5 1983), in which the Court of Appeals for the Fifth Circuit recognized the similarity between the claims raised in *Pulley* and the claim raised by Williams and other condemned prisoners in Louisiana.

[4] Article 905.9 of the Louisiana Code of Criminal Procedure requires that the Supreme Court of Louisiana "review every sentence of death to determine if it is excessive" and directs the court to "establish such procedures as are necessary to satisfy constitutional criteria for review." La. Code Crim. Proc. Ann., Art. 905.9 (West Supp. 1983). Acting pursuant to that direction, the court has adopted its own Rule 28, which provides in relevant part that "[i]n determining whether the sentence is excessive the court shall determine . . . whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Louisiana Supreme Court Rule 28, § 1(c).

Moreover, the system for appellate review in Louisiana was intentionally patterned after the procedure for review authorized by the Georgia death

The review was undertaken in April 1980, when Williams' case was on direct appeal before the Supreme Court of Louisiana. The court compared the circumstances of Williams' crime with the crimes of other capital defendants in the Nineteenth Judicial District for the Parish of East Baton Rouge, La., the district or parish in which Williams was tried and convicted. At that time, only 28 murder prosecutions had taken place in the district since January 1, 1976, the relevant date under state rules on which to begin the comparison. Of those 28 prosecutions, only 11 resulted in convictions for first-degree murder. And of those 11, only 3 defendants were sentenced to death. Like Williams, all three were the actual killers in a murder taking place during the perpetration of an armed robbery. And the court conclusorily noted that the crimes committed by the eight defendants receiving life imprisonment had no aggravating circumstances or some mitigating circumstances and therefore were distinguishable from Williams' case. But, as the state court also admitted, Williams had no significant prior criminal record and may have been affected by a drug-induced mental disturbance. Therefore, the proportionality review undertaken in this case, limited as it was to a few cases arising in a single judicial district, could not ensure that similarly situated defendants throughout the State of Louisiana also had received a death sentence.

Louisiana has a total of 40 judicial districts in which a death sentence may be imposed. They apparently range from districts that cover primarily rural areas to a district that covers the urban center of New Orleans. Yet by allowing the Supreme Court of Louisiana to limit its proportionality review to a particular district, the Court today sanctions a practice

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penalty statute and approved by this Court in *Gregg* v. *Georgia*, 428 U. S. 153 (1976). See *State* v. *Sonnier*, 379 So. 2d 1336, 1358 (La. 1979). The Georgia procedure, of course, includes a proportionality review that compares a death sentence to other sentences imposed *throughout the State*. *Gregg* v. *Georgia*, *supra*, at 204–206; see *supra*, at 58.

that undoubtedly results in different sentences for similarly situated defendants, dependent solely upon the judicial district in which the defendant was tried. This is the essence of arbitrary and capricious imposition of the death penalty that the Court has consistently denounced. "A constant theme of our cases . . . has been emphasis on procedural protections that are intended to ensure that the death penalty will be imposed in a consistent, rational manner." *Barclay* v. *Florida*, 463 U. S. 939, 960 (1983) (STEVENS, J., concurring in judgment). Central to these protections is a system that includes meaningful appellate review for every death sentence. See, *e. g.*, *Zant* v. *Stephens*, 462 U. S., at 875 and 876; *Gregg* v. *Georgia*, 428 U. S., at 195, 204–206. Given the existence of only one statewide death penalty statute approved by the Louisiana State Legislature, requiring that all courts and juries across the State apply uniform legal standards before imposing a death sentence, there can be no doubt of the substantiality of the constitutional question whether the State Supreme Court may apply different standards of appellate review depending on the judicial district involved.

In sum, Williams has raised a substantial claim challenging the constitutionality of his death sentence which is encompassed within the questions presented to the Court in *Pulley* v. *Harris*. Given the severity and irrevocability of the death sentence, it is shocking that the Court does not follow its normal procedures in this case. Under these procedures, the stay of execution should be left in force pending the timely filing of a petition for certiorari, and the final disposition in *Pulley*.

III

The Court offers no defensible rationale for departing from this sensible practice.[5] Its action in this case is especially troubling because (1) it is based on the minimal filings associated with a stay application, (2) it effectively pre-empts one of the questions presented for review in *Pulley*, and (3) it apparently is an irrevocable decision that will result in Williams' execution.

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[5] On several occasions, I and other Members of the Court have expressed disapproval for the "'growing and inexplicable readiness . . . to "dispose of" cases summarily.'" *Hutto* v. *Davis*, 454 U. S. 370, 387 (1982) (BREN-

Less than five weeks ago, on October 5, 1983, JUSTICE WHITE stayed the execution of a condemned prisoner who, mere hours before his execution, claimed that he had been denied due process because the Texas Court of Criminal Appeals had failed to subject his death sentence to any proportionality review. See *Autry* v. *Estelle*, *post*, p. 1301 (in chambers). JUSTICE WHITE concluded that Autry's execution should be stayed pending disposition of *Pulley* because the Court's decision in *Pulley* will likely have a bearing on the validity of that prisoner's last-minute claim. Since then, the full Court has refused to vacate that stay. *Post*, p. 925. Incredibly, the sensible practice followed in *Autry* has been rejected in this case because the Supreme Court of Louisiana utilized a limited proportionality review whereas in *Autry* the state court did not apply any such review. For present purposes, however, this is a distinction which should make no difference. Given the questions presented in *Pulley*, see *supra*, at 57, it is impossible to be certain that the proportionality review accorded Williams satisfies the constitutional requirements that the *Pulley* decision is intended to clarify.

It is no answer that the Court has consistently denied challenges to Louisiana's districtwide proportionality review, including Williams' own challenge to that review in his petition for certiorari on his first federal habeas. *Williams* v. *Maggio*, 463 U. S. 1214 (1983). For each of these denials, as is true of all denials of certiorari, is not a decision on the merits of the issues raised in the respective petitions. More

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NAN, J., dissenting) (quoting *Harris* v. *Rivera*, 454 U. S. 339, 349 (1981) (MARSHALL, J., dissenting)). For the various reasons expressed in the text, this practice proves especially disturbing in this case.

important, in none of those cases did the Court's denial of certiorari involve an imminent date of execution. In this case, by contrast, the Court's action will allow the execution of Williams to proceed to its fatal conclusion even though uncertainty overhangs the constitutional legitimacy of the process by which his death sentence was affirmed.[6]

Nor may the Court take comfort in the fact that, in the course of denying Williams' request for habeas relief, the Federal District Court conducted an abbreviated statewide proportionality review based on the published opinions of the Supreme Court of Louisiana. Although the District Court concluded that Williams' sentence was not disproportionate, that finding is largely irrelevant to the issue raised by Williams. The District Court's judgment regarding the proportionality of the death sentence is insufficient because it cannot substitute for the State Supreme Court, which is presumably more familiar than the federal court with the important nuances of the State's death penalty jurisprudence. Moreover, because Williams' requested remedy on habeas was a remand to the state court for a statewide proportionality review, the District Court did not have the benefit of any arguments from counsel for Williams on how that statewide review should be conducted. That the District Court conducted a hasty proportionality review based solely on published opinions from the State Supreme Court should not be deemed constitutionally sufficient.

Finally, the Court gives insufficient weight to the potential prejudicial effect of the limited, districtwide review conducted in Williams' case. In fact, Williams' habeas petition has identified at least two specific ways in which he has been prejudiced by a districtwide, rather than a statewide, proportionality review. First, he claims that there has never been a statewide pattern of death sentences for persons committing murder during armed robbery, especially when there was a close question whether the murder was committed with specific intent or was simply accidental. Second, Williams claims that his case presented mitigating circumstances comparable to various cases in other parts of the State which resulted in sentences of life imprisonment. These are exactly the types of disparities which a proportionality review of proper scope would discover.

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[6] Under Louisiana law, "if any federal court . . . grants a stay of execution, the trial court shall fix the execution date at not less than thirty days nor more than forty-five days from the dissolution of the stay order." La. Rev. Stat. Ann. § 15:567 (West Supp. 1983). This means that Williams' execution can be rescheduled mere weeks after this Court hears oral argument in *Pulley*, at a time when it is extremely unlikely that the Court will have already rendered its decision in that case.

The Court, therefore, plainly offers no reason for treating this case differently from any other stay application raising questions which are encompassed within a substantially similar case then pending on the Court's plenary docket. Rather, "an appeal that raises a substantial constitutional question is to be singled out for summary treatment *solely because the State has announced its intention to execute . . . before the ordinary appellate procedure has run its course.*" *Barefoot* v. *Estelle*, 463 U. S. 880, 913 (1983) (MARSHALL, J., dissenting) (emphasis in original).[7]

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[7] At least two other claims raised by Williams also suggest that the State should not be allowed to proceed with this execution. First, as JUSTICE STEVENS notes, *ante*, p. 52, Williams has raised a serious question concerning the prosecutor's argument to the jury. That argument unduly prejudiced Williams because, by overstating the role of appellate review, it both misstated Louisiana law and allowed the jury to discount its grave responsibilities when imposing the death sentence. Unlike JUSTICE STEVENS, however, I believe *Sanders* v. *United States*, 373 U. S. 1 (1963), mandates that the case be remanded for a full hearing on this matter.

Second, Williams has alleged that exclusion for cause of jurors unequivocally opposed to the death penalty resulted in a biased jury during the guilt phase of the trial proceedings against him. The Court has previously noted that, "[i]n light of . . . presently available information," it cannot be said that such juror exclusion results in an unrepresentative jury on the issue of guilt. See, *e. g.*, *Witherspoon* v. *Illinois*, 391 U. S. 510, 516–518

IV

By vacating the stay granted by the Court of Appeals and allowing the execution of Williams to proceed, the Court is implicitly choosing to adopt one of two wholly unacceptable alternatives. Either the Court, prior to its full consideration of *Pulley*, is pre-empting any conclusion that the Constitution mandates statewide proportionality review, or the Court is announcing that someone may be executed using appellate procedures that might imminently be declared unconstitutional. Only after full consideration and disposition of *Pulley* will the Court be in a position to determine with reasonable assurance the validity of the claims raised by Williams. I am appalled that the Court should be unwilling to let stand a stay of execution pending the clarification of this issue.

I dissent.

JUSTICE BLACKMUN, dissenting.

I would not vacate the stay granted by the United States Court of Appeals for the Fifth Circuit until this Court decides *Pulley* v. *Harris*, No. 82–1095, argued today. I share JUSTICE BRENNAN's view that the resolution of the proportionality issue presented in *Pulley* inevitably will have some bearing on the proportionality issue raised by Robert Wayne Williams. To be sure, the decision forthcoming in *Pulley* v. *Harris* may or may not be favorable to Williams. However that may be, by vacating the stay, the Court today summarily decides the issue against Williams and, to that extent, pre-empts *Pulley*.

(1968). See also *Bumper* v. *North Carolina*, 391 U. S. 543, 545, and nn. 5, 6 (1968). That conclusion, however, was reached 15 years ago, and recent cases and scholarship suggest that it may need to be reexamined. See, *e. g.*, *Grigsby* v. *Mabry*, 569 F. Supp. 1273 (ED Ark. 1983); Winick, Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis, 81 Mich. L. Rev. 1 (1982). An evidentiary hearing on this issue is clearly necessary.

It seems to me that standards of orderly procedure require that the stay of execution granted by the Fifth Circuit remain in effect until *Pulley* is decided. I therefore dissent from what appears to be an untoward rush to judgment in a capital case.

IRON ARROW HONOR SOCIETY ET AL. *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 83–118. Decided November 14, 1983

Petitioner Iron Arrow Honor Society (hereafter petitioner), an all-male honorary organization at the University of Miami, has traditionally conducted its initiation "tapping" ceremony on the University's campus. In 1976, the Secretary of Health, Education, and Welfare (HEW) notified the University that the HEW had determined that the University was violating an HEW regulation implementing § 901(a) of Title IX of the Education Amendments of 1972 and prohibiting a university that receives federal funds from giving "significant assistance" to any organization that discriminates on the basis of sex in providing any aid, benefit, or service to students. The University thereafter prohibited the "tapping" ceremony. Petitioner then brought an action in Federal District Court, seeking to prevent the Secretary from interpreting the regulation so as to require the University to ban petitioner's activities from campus. Before the Court of Appeals ultimately affirmed a summary judgment for the Secretary, the president of the University wrote a letter to petitioner stating that it could not return to or conduct its activities on campus until it discontinued its discriminatory membership policy, and that this was the University's position regardless of the outcome of the lawsuit. The Court of Appeals held that the letter did not moot the case because it could still grant some relief to petitioner.

Held: The president's letter renders the case moot, and the Court of Appeals had no jurisdiction to decide it.

(a) To satisfy the Art. III case-or-controversy requirement, a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision. Here, no resolution of the dispute can redress petitioner's grievance. Whatever the correctness of the Secretary's interpretation of the regulation in question, the University has stated unequivocally that it will not allow petitioner to conduct its activities on campus as long as it refuses to admit women. It is the University's action, not that of the Secretary, that excludes petitioner.

(b) Whether or not the Court of Appeals could grant relief to petitioner against an enforcement action other than one seeking to ban petitioner from campus, need not be decided, as the Secretary is not requesting the University to take such additional steps and petitioner has not sought in this lawsuit to prevent the University from doing so.

(c) Since this case concerns the effect of the voluntary acts of a third-party nondefendant, it is not controlled by the line of cases in which it has been held that the voluntary discontinuance of challenged activities by a *defendant* does not moot the lawsuit absent proof that "there is no reasonable likelihood that the wrong will be repeated." But even assuming that such line of cases applies, it does not appear on the basis of the letter in question that there is any "reasonable likelihood" that the University will change its mind and decide to invite petitioner to return to campus.

Certiorari granted; 702 F. 2d 549, vacated and remanded.

PER CURIAM.

Petitioner Iron Arrow Honor Society is an all-male honorary organization founded by the first president of the University of Miami to honor outstanding University men. Traditionally, the Society has conducted its initiation ceremony on a "tapping" mound outside the student union building on University property. In 1972 Congress enacted § 901(a) of Title IX of the Education Amendments, 86 Stat. 373, 20 U. S. C. § 1681(a), and in 1974 the Department of Health, Education, and Welfare promulgated regulations implementing the statute. Regulation 86.31(b)(7) provides that "a recipient [of federal funds] shall not, on the basis of sex: . . . (7) [a]id or perpetuate discrimination against any person *by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex* in providing any aid, benefit or service to students or employees." 45 CFR § 86.31(b)(7) (1975) (emphasis added) (recodified at 34 CFR § 106.31(b)(7) (1982)).

In 1976 the Secretary notified the University's president of its determination that the University was rendering "significant assistance" within the meaning of the regulation to Iron Arrow. The University advised the Secretary that it wished to comply with Title IX, but asked for time to negotiate with Iron Arrow about changing its membership policy; the Secretary agreed, but only upon the condition that the University ban the "tapping" ceremony on campus until the question was resolved.

The University thereafter prohibited the "tapping" ceremony, and Iron Arrow responded by suing the Secretary in the United States District Court for the Southern District of Florida. It sought declaratory and injunctive relief to prevent the Secretary from interpreting Regulation 86.31(b)(7) so as to require the University to ban Iron Arrow's activities from campus. The District Court held that Iron Arrow had no standing to challenge the Secretary's action and the regulations, but this determination was reversed by the Court of Appeals for the Fifth Circuit. *Iron Arrow Honor Society* v. *Califano*, 597 F. 2d 590, 591 (1979). The District Court then granted summary judgment for the Secretary, *Iron Arrow Honor Society* v. *Hustedler*, 499 F. Supp. 496 (1980), and the Court of Appeals for the Fifth Circuit affirmed. *Iron Arrow Honor Society* v. *Schweiker*, 652 F. 2d 445 (1981). We granted Iron Arrow's petition for certiorari, vacated the decision of the Court of Appeals for the Fifth Circuit, and remanded for further consideration in light of *North Haven Board of Education* v. *Bell*, 456 U. S. 512 (1982). *Iron Arrow Honor Society* v. *Schweiker*, 458 U. S. 1102 (1982). On remand the Court of Appeals for the Fifth Circuit again affirmed with one judge dissenting. 702 F. 2d 549 (1983).

After our remand but before the decision of the Court of Appeals for the Fifth Circuit, the president of the University wrote a letter to the chief of Iron Arrow. It stated the University's unequivocal position that Iron Arrow cannot return to campus as a University organization nor conduct its activities on campus until it discontinues its discriminatory membership policy. Letter from Edward T. Foote II to C. Rhea Warren (Sept. 23, 1982), reprinted in App. to Brief for Federal Respondents, 1a–4a. The Trustee Executive Committee had adopted that position on July 15, 1980, determining that Iron Arrow may return to campus only if it satisfies the code for all student organizations, a code which includes a policy of nondiscrimination. The president's letter moreover informed Iron Arrow that the University would maintain that position, regardless of the outcome of Iron Arrow's lawsuit. Specifically the letter stated:

> "The question is not only what the law requires. The most important question is what our University *should* do, in fairness to all students, whether the law requires it or not.
>
> . . . . .
>
> "To avoid any ambiguity that might be present because of the passage of time or change of University administrations, I have instructed counsel for the University to inform the Courts of the University's policy." *Id.*, at 2a–4a (emphasis in original).

The president further informed Iron Arrow that he was making the letter public and that he was sending a copy to all of Iron Arrow's undergraduate members. *Id.*, at 4a.

Both before the Court of Appeals for the Fifth Circuit and now before this Court in the Secretary's response to Iron Arrow's latest petition for certiorari, the Secretary has argued that that letter renders the case moot. For the reasons which follow, we agree that the case has become moot during the pendency of this litigation.

Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies. *DeFunis* v. *Odegaard*, 416 U. S. 312, 316 (1974). To satisfy the Art. III case-or-controversy requirement, a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U. S. 26, 38 (1976). We think that no resolution of the present dispute between these parties can redress Iron Arrow's asserted grievance. Whatever the correctness of the Secretary's interpretation of the regulation in question, the University has stated unequivocally that it will not allow Iron Arrow to conduct its initiation activities on University property as long as it refuses to admit women. Thus the dispute as to how the regulation should be interpreted, or the extent to which it faithfully implements the statute, is classically "moot." It is the action of the University, not that of the Secretary, which excludes Iron Arrow.

The Court of Appeals concluded by a divided vote that the case was not moot because it could still grant some relief to Iron Arrow. 702 F. 2d, at 552. It stated that the Secretary could still require the University to take other steps to comply with Title IX in addition to banning Iron Arrow from campus. For example, it could require the University to abolish all historical ties with Iron Arrow, refuse to allow Iron Arrow to use the University's name, etc. *Ibid.* The court concluded that if it decided in Iron Arrow's favor, it could issue an injunction which "would serve to insulate the plaintiffs from all of these appropriate additional enforcement actions." *Ibid.*

Whether or not these would be "appropriate additional enforcement actions," neither we nor the Court of Appeals need decide, since the Secretary is not requesting the University to take such additional steps, see Brief for Federal Respondents 13, and Iron Arrow has not sought in this lawsuit to prevent the University from doing so. Future positions taken by the parties might bring such issues into controversy, but that possibility is simply too remote from the present controversy to keep this case alive. See *Golden* v. *Zwickler*, 394 U. S. 103, 109 (1969).[1]

In rejecting the Secretary's argument that the case is moot, the Court of Appeals also relied on a line of cases from this Court supporting the proposition that the "'[v]oluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power.'" 702 F. 2d, at 553 (quoting *Walling* v. *Helmerich & Payne*, 323 U. S. 37, 43 (1944)). As the dissent noted, however, most of those cases discuss whether voluntary discontinuance of challenged activities by a *defendant* moots a lawsuit. 702 F. 2d, at 565, 567 (Roney, J., dissenting). But see *St. Paul Fire & Marine Insurance Co.* v. *Barry*, 438 U. S. 531, 537–538 (1978) (involving subsequent acts of a third party). Defendants face a heavy burden to establish mootness in such cases because otherwise they would simply be free to "return to [their] old ways" after the threat of a lawsuit had passed. *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632 (1953). Thus they must establish that "there is no reasonable likelihood that the wrong will be repeated." *Id.*, at 633 (citation omitted).

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[1] Iron Arrow also appears to have sought a declaration of its rights under Regulation 86.31(b)(7) pursuant to 28 U. S. C. § 2201. *Iron Arrow Honor Society* v. *Hustedler*, 499 F. Supp. 496, 499 (SD Fla. 1980). It, however, has no standing under that section to seek a generalized declaration of its rights against *future* actions of the Secretary. See *Public Service Comm'n* v. *Wycoff Co.*, 344 U. S. 237, 241–249 (1952).

This case, however, concerns the effect of the voluntary acts of a third-party nondefendant.[2] It is not the typical case where it could be argued that the University has taken its position only in order to escape the threat of an injunction. Indeed, Iron Arrow does not challenge the University's conduct in this lawsuit. Assuming that the "voluntary discontinuance" line of cases nonetheless applies to this different situation, the letter from the president expresses the University's voluntary and unequivocal intention to exclude Iron Arrow's activities from campus. Because the University has announced its decision to Iron Arrow, the public, and the courts, we conclude that there is "no reasonable likelihood" that the University will later change its mind and decide to invite Iron Arrow to return.

Because of the position that the University has taken irrespective of the outcome of this lawsuit, we conclude that the case is moot and that the Court of Appeals had no jurisdiction to decide it. Accordingly, we grant the petition for a writ of certiorari, vacate the judgment of the Court of Appeals for the Fifth Circuit, and remand to that court for entry of an appropriate order directing the District Court to dismiss the action as moot. See *County of Los Angeles* v. *Davis*, 440 U. S. 625, 634 (1979); *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39–40 (1950).

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[2] The University is not a named defendant in this action. The District Court did, however, join the University as an indispensable party under Federal Rule of Civil Procedure 19 in order to assure that the court could award adequate relief to Iron Arrow if it prevailed. 499 F. Supp., at 499.

It is so ordered.

JUSTICE MARSHALL and JUSTICE BLACKMUN would deny certiorari.

JUSTICE BRENNAN, dissenting.

In my view, the issue of mootness is sufficiently dependent on uncertain factual issues concerning the University's present intention and future conduct that I would grant the petition for certiorari, vacate the decision of the Court of Appeals, and remand for resolution of this issue.

JUSTICE STEVENS, dissenting.

"Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell* v. *McCormack*, 395 U. S. 486, 496 (1969).[1] Both the parties and the Court agree that the issues presented in this case remain "live"; the parties continue to disagree as to what the obligations are that federal law imposes upon the University of Miami. Nevertheless, the Court holds that this case is moot and directs the District Court to dismiss the case because it concludes that the parties no longer have a stake in the outcome of this litigation.[2] I disagree.

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[1] The Court continues to follow this test for mootness. See, *e. g.*, *Murphy* v. *Hunt*, 455 U. S. 478, 481 (1982) *(per curiam)*; *United States Parole Comm'n* v. *Geraghty*, 445 U. S. 388, 396 (1980).

[2] In taking this action, the Court does something that none of the parties ask it to do. The Government does not contend that the question of mootness is so clear that dismissal at this juncture would be appropriate; all it

When petitioners originally brought this suit in 1976, they claimed that the Secretary of Health, Education, and Welfare lacked the authority to cut off federal funds to the University because of the University's relationship with Iron Arrow. In 1982, six years after the Secretary had notified the University of Miami that it was violating § 901(a) of Title IX of the Education Amendments of 1972, 86 Stat. 373, 20 U. S. C. § 1681(a), two years after a United States District Court had held that the University was violating the law, and one year after the Court of Appeals affirmed the District Court, the president of the University wrote a letter announcing that the University had "voluntarily" decided to make a change in the policy with respect to Iron Arrow that it had followed throughout the entire history of the University. That letter, and that letter alone, is the basis on which the Court holds that this case is moot.[3] The Court's position is that the University's "voluntary" decision to sever its ties to Iron Arrow irrespective of the outcome of this case deprives Iron Arrow of a stake in the outcome, and hence moots the case.

It is well settled that the voluntary cessation of allegedly unlawful conduct does not moot a case in which the legality of that conduct has been placed in issue.[4] The rationale for

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requests is that the Court remand the case to the District Court for a *hearing* on the question of mootness. See Brief for Federal Respondents 15–16, 18.

[3] While I need not, and do not question the sincerity of the University's change of heart, it appears that petitioners do question it. The existence of a factual dispute on this point is presumably why the Government does not request that the Court simply order the case dismissed as moot, but rather that it remand the case for an evidentiary hearing. Nevertheless, the Court, without explanation, declines to follow this suggestion.

[4] See *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U. S. 283, 289 (1982); *Allee* v. *Medrano*, 416 U. S. 802, 810–811 (1974); *DeFunis* v. *Odegaard*, 416 U. S. 312, 318 (1974) *(per curiam); United States* v. *Phosphate Export Assn., Inc.*, 393 U. S. 199, 203 (1968); *Gray* v. *Sanders*, 372 U. S. 368, 375–376 (1963); *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632 (1953); *Walling* v. *Helmerich & Payne*, 323 U. S. 37, 42–43 (1944); *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 309–310 (1897). See also *Los Angeles* v. *Lyons*, 461 U. S. 95, 100–101 (1983).

this rule is straightforward: "[m]ere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.'" *United States* v. *Phosphate Export Assn., Inc.*, 393 U. S. 199, 203 (1968) (quoting *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632 (1953)). Whenever there is a risk that the defendant will "return to his old ways," the plaintiff continues to have a stake in the outcome—its interest in not continuing to be subjected to that risk.

I am willing to assume, as does the Court, that *if this case is dismissed*, there is no risk that the University will resume its relationship with Iron Arrow. But it is exactly that fact which means this case is *not* moot.

Petitioners claim that the reason the University has ended its relationship with Iron Arrow is the Secretary's assertedly unlawful threat to terminate federal financial assistance to the University unless it severed its ties to Iron Arrow.[5] That threat continues to hang over the University's head, and could not help but influence the University's reaction should an attempt be made to persuade it to reexamine its decision to end its relationship with Iron Arrow. Petitioners assert that this continuing threat injures them because it prevents the University from reexamining its decision free from the coercive threat it now faces. That injury persists; hence, this case has not been mooted.

It is true that the letter from the president states that the University will not resume its relationship with Iron Arrow irrespective of the outcome of this suit. The Court says of the University's decision: "It is not the typical case where it could be argued that the University has taken its position only to escape the threat of an injunction." *Ante*, at 72. However, it can be argued, and petitioners do argue, that the University has taken its position only to escape the threat of termination of funds. We have only the University's assurance that it has made its decision voluntarily, without reference to this threat. But no such voluntary decision was made during the years preceding the Secretary's threat, and our cases make clear that a mere assurance that the cessation of activity has been "voluntary" is insufficient when the cessation occurs in response to a coercive sanction. When a defendant ceases challenged conduct because it has been sued, its mere assurance that it will not return to its old ways is insufficient to moot the case. *Quern* v. *Mandley*, 436 U. S. 725, 733, n. 7 (1978); *United States* v. *W. T. Grant Co.*, *supra*, at 632–633. Even if the defendant can demonstrate that it would be uneconomical for it to resume the challenged activity, the case is not mooted. See *United States* v. *Phosphate Export Assn., Inc.*, *supra*, at 202–204.[6] Similarly, a defendant's assurance that it discontinued the challenged activity for reasons entirely unrelated to the pendency of the suit is insufficient to moot the case. See *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 307–309 (1897). These principles apply to the University's assurance regarding its relationship with Iron Arrow. The University made its decision to end its support for Iron Arrow under threat of a coercive sanction. That decision should no more suffice to moot a case than a decision made under the cloud of a lawsuit, which, after all, is nothing more than the threat of another form of coercive sanction.[7]

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[5] No finding of fact has been made that this is not the case, and the Court does not purport to make such a finding.

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[6] See also *Reeves, Inc.* v. *Stake*, 447 U. S. 429, 434, n. 7 (1980).

[7] The Court attempts to distinguish these cases by arguing that they only apply to defendants to lawsuits and not to nondefendants. Putting aside the fact that the University is not only a defendant, but also an indispensable party, in this lawsuit, the Court itself seems to recognize that the principles regarding voluntary cessation apply where the cessation of activity is by a third party and not a defendant. *Ante*, at 72 (citing *St. Paul Fire & Marine Insurance Co.* v. *Barry*, 438 U. S. 531, 537–538 (1978)). See also *Phosphate Export Assn.*, *supra*, at 202–204. Moreover, the reason that the doctrine is normally applied to defendants in lawsuits is that when a defendant ceases its activity it does so under the threat of a coercive sanction. In this case, the University did just that.

We cannot know what the future might hold for the relationship between the Iron Arrow Society and the University. If Iron Arrow were permitted to litigate this case to a conclusion, and if this Court were to hold that the Secretary may not threaten to terminate federal assistance to the University because of its relationship with Iron Arrow—if this threat could no longer have any influence on the University's evaluation of the problem—the alumni membership of Iron Arrow might well be able to persuade the University to reexamine its decision. Surely our cases indicate that the University must make its decision free from any coercive influence before the case can be mooted—particularly when the successful prosecution of the litigation would end the coercion.

While I express no opinion on whether or not the University's support of Iron Arrow did violate federal law, it is clear to me that Iron Arrow is entitled to have the question decided, and that if Iron Arrow prevails, it would then be entitled to request that the University make a fresh examination of the policy question unhampered by the threat of the termination of federal funding. If it took six years for that threat to produce the 1982 decision, it is not fanciful to suggest that the University values its relationship with Iron Arrow sufficiently that it would consider reversing its decision if the threat were removed. In short, Iron Arrow continues to have a legally cognizable stake in the outcome of this case.

I respectfully dissent.

WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* GOODE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 83-131. Decided November 28, 1983

Respondent was convicted of murder in a Florida state court, and the trial judge sentenced him to death. The Florida Supreme Court affirmed. Thereafter, respondent filed a motion in state court to vacate the conviction and sentence, contending that the sentencing judge considered an aggravating circumstance—future dangerousness—that is impermissible under Florida law. The motion was denied, and the denial was affirmed by the Florida Supreme Court. Respondent then filed a habeas corpus petition in the Florida Supreme Court, which, in denying the petition, held that the record failed to show that the sentencing judge had relied upon the claimed impermissible factor. Respondent then filed a habeas corpus petition in Federal District Court, which, in dismissing the petition, similarly held that the claim that the trial judge improperly considered a nonstatutory aggravating circumstance in imposing sentence was not supported by the record. But the Court of Appeals reversed, concluding from the record that the Florida Supreme Court's finding that the sentencing judge had not relied on respondent's future dangerousness, although entitled to a presumption of correctness under 28 U. S. C. § 2254(d)(8), was "not fairly supported by the record as a whole," and that the execution of respondent would be a "unique, freakish instance" in violation of the Eighth Amendment.

Held:

1. Assuming that the issue of whether the sentencing judge had relied on a nonstatutory aggravating circumstance was one of law, it is an issue of state law that was resolved by the Florida Supreme Court. That resolution should have been accepted by the Court of Appeals, since the views of a State's highest court with respect to state law are binding on the federal courts.

2. If, on the other hand, such issue was one of fact, the Court of Appeals failed to give proper weight to the state court's resolution of the issue. The rule under 28 U. S. C. § 2254(d)(8) that a federal court, in ruling on a habeas corpus petition, may not overturn a state court's factual conclusion unless such conclusion is not "fairly supported by the record," applies equally to findings of trial courts and appellate courts. Here, because the Florida Supreme Court's conclusions find fair support

in the record, the Court of Appeals erred in substituting its view of the facts for that of the Florida Supreme Court.

3. Even if the Court of Appeals were correct in concluding that the sentencing judge had relied on a factor unavailable to him under state law, it erred in reversing the District Court's dismissal of respondent's habeas corpus petition. It does not appear that if the sentencing judge did consider such a factor, the balancing process of comparing aggravating and mitigating circumstances, as prescribed by the Florida statute, was so infected as to render the death sentence constitutionally impermissible. Whatever may have been true of the sentencing judge, there is no claim that in conducting its independent reweighing of the aggravating and mitigating circumstances the Florida Supreme Court considered respondent's future dangerousness. Thus, there is no basis for concluding that the procedures followed by the State produced an arbitrary or freakish sentence forbidden by the Eighth Amendment.

Certiorari granted; 704 F. 2d 593, reversed and remanded.

PER CURIAM.

Petitioner, the Secretary of the Florida Department of Corrections, requests review of a decision of the United States Court of Appeals for the Eleventh Circuit ordering the District Court for the Middle District of Florida to issue a writ of habeas corpus conditional upon the resentencing of respondent. For the reasons set out below, we reverse.

I

On March 5, 1976, respondent, Arthur Goode, took a 10-year-old boy ("Jason") from a school bus stop in Florida, sexually assaulted him, and strangled him with a belt. Respondent then went to Maryland where he had previously escaped from a mental hospital. While in Maryland, he kidnaped two young boys, one of whom he killed in Virginia. The State of Virginia tried and convicted respondent of the Virginia murder and sentenced him to life imprisonment.

Goode was returned to Florida to stand trial for the murder he committed there. Although he entered a plea of "not guilty," there was never a question whether Goode committed the crime, since at trial he testified in graphic detail as to the circumstances of the killing. He was found guilty by a jury of first-degree murder.

At the sentencing phase of the trial, Goode again took the witness stand. He stated that he was "extremely proud" of having murdered Jason "for the fun of it," that he had "absolutely no remorse" over the murder, and that he would do it again if given the chance. The jury recommended the death penalty.[1] Prior to the issuance of the trial court's judgment, Smith, an attorney who had assisted in Goode's defense, made a statement on Goode's behalf to the effect that society would gain more if Goode were given a life sentence and subjected to scientific study to determine the causes of sexual abuse of children.

After Smith's statement, the trial judge issued his findings on factors in aggravation and mitigation.[2] He found that three statutory aggravating circumstances had been proved beyond a reasonable doubt. He also found two mitigating circumstances but determined that they did not outweigh the aggravating circumstances. He concluded that Goode should be sentenced to death.

After imposing the death sentence, the trial judge made the following statement:

> "'In closing I want to address myself to Counsel Smith's remarks for just a moment. The question of why should this man be executed for what he has done is

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[1] Under Florida law, the jury does not determine the sentence. Instead, its recommendation is merely advisory. Fla. Stat. § 921.141(2) (Supp. 1983). For a more complete description of the Florida capital-sentencing system, see *Barclay* v. *Florida*, 463 U. S. 939 (1983).

[2] In Florida, three separate determinations must be made prior to the imposition of a death sentence: (1) that the presence of at least one statutory aggravating circumstance has been proved beyond a reasonable doubt; (2) that there are insufficient mitigating circumstances to outweigh the aggravating circumstances; and (3) that death is the appropriate penalty in light of the aggravating and mitigating circumstances. Fla. Stat. § 921.141 (Supp. 1983).

> a question that the Court has wrestled with for several days and has carefully considered the circumstances, but I have to be able to answer to myself why should I invoke the awesome punishment of death. Could not something be learned from Arthur? Am I not doing as I have seen and heard many do and merely so outraged by the activities that he has done that possibly my reason and judgment are blurred? I believe not.
>
> "'If organized society is to exist with the compassion and love that we all espouse, there comes a point when we must terminate that, and there are certain cases and certain times when we can no longer help, we can no longer rehabilitate and there are certain people, and Arthur Goode is one of them, [whose] actions demand that society respond and all we can do is exterminate.
>
> "'Philosophically I believe that in certain limited instances we should do that. In this particular case that is my opinion, and that is my order, and the only answer I know that will once and for all guarantee society, at least as far as it relates to this man, is that he will never again kill, maim, torture or harm another human being, and as you said in trial, Arthur, maybe I don't know who we blame. God forgive you of those desires or something in your environment that has made you have them, and whoever is to blame is beyond the power of this Court.
>
> "'You have violated the laws, you have had your trial and I am convinced that the punishment is just and proper, and truthfully, may God have mercy on your soul.'" 704 F. 2d 593, 604 (CA11 1983).

The conviction and sentence were affirmed on direct appeal to the Florida Supreme Court. *Goode* v. *State*, 365 So. 2d 381 (1978). This Court denied Goode's petition for certiorari. *Goode* v. *Florida*, 441 U. S. 967 (1979). Thereafter, he filed a motion in state court to vacate the judgment and sentence, contending, *inter alia*, that the sentencing judge considered an aggravating circumstance—future dangerousness—that is impermissible under Florida law.[3] The motion was denied, and the denial was affirmed by the Florida Supreme Court on the ground that the matter should have been raised on direct appeal. *Goode* v. *State*, 403 So. 2d 931 (1981). The Governor issued a warrant ordering that Goode be executed on March 2, 1982.

Goode then filed a petition for a writ of habeas corpus in the Florida Supreme Court, claiming that his appellate counsel had been ineffective because he had failed to challenge the trial judge's reliance on the nonstatutory aggravating circumstance. *Goode* v. *Wainwright*, 410 So. 2d 506 (1982). That court reviewed the record of the sentencing hearing and determined that the trial judge had not relied upon the impermissible factor. The court was of the view that the trial judge was merely replying to the statements of Smith and explaining why the result of his weighing process was correct. It stated that "the record fails to show that the trial judge improperly considered non-statutory aggravating circumstances." *Id.*, at 509. Consequently, it denied Goode's petition.

Goode then sought a writ of habeas corpus in Federal District Court. That court found the claim that the trial judge improperly considered a nonstatutory aggravating circumstance in imposing sentence "simply not supported by the record." App. to Pet. for Cert. A–140. It stated that Goode was "[t]aking these remarks completely out of context," *id.*, at A–143, and that they were "made in response to counsel and in philosophical justification of capital punishment both generally and as applied in [Goode's] case," *id.*, at A–144. It concluded that it "would be a gross distortion to conclude on that basis that the statute was not obeyed," *ibid.*, and dismissed the petition. It then granted a certificate of probable cause for appeal, but denied a motion for a stay of execution pending appeal.

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[3] The Florida statute expressly limits consideration of aggravating circumstances to those enumerated in the statute. Fla. Stat. § 921.141(5) (Supp. 1983). In *Miller* v. *State*, 373 So. 2d 882 (1979), the Florida Supreme Court held that it was error for a trial court to consider as an aggravating circumstance the probability that the defendant might commit acts of violence in the future.

The Court of Appeals for the Eleventh Circuit granted Goode's motion for a stay of execution. *Goode* v. *Wainwright*, 670 F. 2d 941 (1982). On review of the merits, a panel of that court assumed, *arguendo*, that the Florida Supreme Court's finding that the sentencing judge had not relied upon Goode's future dangerousness was entitled to a presumption of correctness under 28 U. S. C. § 2254(d)(8). 704 F. 2d, at 605. However, it concluded from its evaluation of the record of the sentencing proceeding that the state-court finding was "not fairly supported by the record as a whole." *Ibid.* The court then reasoned that execution of Goode would be a "unique, freakish instance," because he "would have been executed in reliance upon the recurrence factor, when all others in Florida have not been, and, pursuant to the law established in *Miller*, cannot be in the future." *Id.*, at 608. The court concluded that such an "arbitrary and capricious manner" of execution cannot be countenanced under the Eighth Amendment. *Ibid.* We reverse.

II

Whether the asserted reliance by the sentencing court on a nonstatutory aggravating circumstance is considered to be an issue of law or one of fact, we are quite sure that the Court of Appeals gave insufficient deference to the Florida Supreme Court's resolution of that issue. We first assume that the issue is one of law.

It is axiomatic that federal courts may intervene in the state judicial process only to correct wrongs of a constitutional dimension. *Engle* v. *Isaac*, 456 U. S. 107 (1982);

Smith v. *Phillips*, 455 U. S. 209 (1982). Section 2254 is explicit that a federal court is to entertain an application for a writ of habeas corpus "only on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." The Eleventh Circuit's ultimate conclusion was that the sentencing proceeding violated the Eighth Amendment, but it is critical to understand the reasoning it employed in reaching that result. It acknowledged that the Federal Constitution does not prohibit consideration of a defendant's future dangerousness. In fact, the court described the factor as "highly relevant to the purposes underlying capital sentencing." 704 F. 2d, at 608, n. 18. Nevertheless, future dangerousness was a nonstatutory aggravating circumstance that could not be relied upon to impose the death sentence without violating Florida law. Because the Court of Appeals was of the view that the sentencing judge had relied on future dangerousness, the death sentence violated state law and was deemed to be an arbitrary punishment under the Eighth Amendment.

The difficulty with all of this is that the Florida Supreme Court had concluded that the trial judge had not improperly relied on future dangerousness in imposing the death penalty. If the interpretation of the trial court's remarks is deemed a legal issue, it is surely an issue of state law that the Court of Appeals should have accepted, since the views of the State's highest court with respect to state law are binding on the federal courts. See, *e. g.*, *Brown* v. *Ohio*, 432 U. S. 161, 167 (1977); *Garner* v. *Louisiana*, 368 U. S. 157, 169 (1961). If the Florida Supreme Court's conclusion that the death sentence was consistent with state law is accepted, the constitutional violation found by the Court of Appeals dissolves.

III

If, on the other hand, the issue of whether the sentencing judge relied upon future dangerousness in imposing the death

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sentence is characterized as an issue of historical fact to be decided on the transcript of the judge's remarks at the sentencing proceeding, we are convinced that the Court of Appeals failed to give proper weight to the state court's resolution of this factual issue.

Under 28 U. S. C. § 2254(d)(8), a federal court, in ruling on a petition for a writ of habeas corpus, is not to overturn a factual conclusion of a state court unless the conclusion is not "fairly supported by the record." That rule applies equally to findings of trial courts and appellate courts, *Sumner* v. *Mata*, 449 U. S. 539, 545–547 (1981), and requires reversal here.

The seven justices of the Supreme Court of Florida concluded from their review of the sentencing proceeding that the trial judge had not relied upon the impermissible factor. On federal habeas review, the District Court likewise concluded that the sentencing judge did not rely on future dangerousness, emphasizing that its review of the record led it to the "same, independent conclusion" as that reached by the Florida court. Consequently, eight judges have concluded from their review of the record that the trial court did not rely on predictions of future dangerousness. A three-member panel of the Court of Appeals for the Eleventh Circuit, on the other hand, concluded that the state court's finding was not fairly supported by the record.

At best, the record is ambiguous. The trial judge might have been describing his consideration of Goode's future dangerousness in the weighing process, or he might have been merely explaining, after having imposed the death sentence in accordance with state standards and without regard to future dangerousness, why he thought that application of the state standards to Goode yielded an intuitively correct result. Because both of these conclusions find fair support in the record, we believe the Court of Appeals erred in substituting its view of the facts for that of the Florida Supreme Court.

IV

Even if the Court of Appeals had been correct in concluding that the sentencing judge had relied on a factor unavailable to him under state law, it erred in reversing the District Court's dismissal of Goode's habeas petition.

Although recognizing that a State is free to enact a system of capital sentencing in which a defendant's future dangerousness is considered, the Court of Appeals believed that the Florida court's failure to follow Florida law constituted a violation of the Eighth and Fourteenth Amendments because it would result in an "arbitrary" and "freakish" execution. 704 F. 2d, at 610.

In *Barclay* v. *Florida*, 463 U. S. 939 (1983), the Court upheld a death sentence despite the reliance by the trial court on an aggravating circumstance that was improper under state law. The plurality stated that "mere errors of state law are not the concern of this Court, *Gryger* v. *Burke*, 334 U. S. 728, 731 (1948), unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution." *Id.*, at 957–958. The critical question "is whether the trial judge's consideration of this improper aggravating circumstance so infects the balancing process created by the Florida statute that it is constitutionally impermissible for the Florida Supreme Court to let the sentence stand." *Id.*, at 956.

We have great difficulty concluding that the balancing process was so infected. A properly instructed jury recommended a death sentence. On direct appeal to the Florida Supreme Court, the court stated that "[c]omparing the aggravating and mitigating circumstances with those shown in other capital cases and weighing the evidence in the case sub judice, our judgment is that death is the proper sentence." *Goode* v. *State*, 365 So. 2d, at 384–385. Whatever may have been true of the sentencing judge, there is no claim that in conducting its independent reweighing of the aggravating and mitigating circumstances the Florida Supreme Court considered Goode's future dangerousness. Consequently, there is no sound basis for concluding that the procedures followed by the State produced an arbitrary or freakish sentence forbidden by the Eighth Amendment.

The motion of respondent for leave to proceed *in forma pauperis* is granted.

The petition for certiorari is granted, the judgment of the Court of Appeals for the Eleventh Circuit is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would deny the petition for certiorari.

Even if I were to accept the prevailing view that the death penalty is constitutionally permissible under certain circumstances, I would nonetheless object to the Court's summary reversal of the decision of the Court of Appeals. By taking this step, the Court adds to a growing and disturbing trend toward summary disposition of cases involving capital punishment.

When an intervening decision of this Court may affect a lower court's decision, our practice has generally been to grant the petition for certiorari, vacate the lower court judgment, and remand for further consideration in light of the intervening decision. See, *e. g.*, *Wainwright* v. *Henry*, 463 U. S. 1223 (1983). In the present case, as the Court acknowledges, our recent decision in *Barclay* v. *Florida*, 463

U. S. 939 (1983), plainly bears upon the constitutional questions considered by the Court of Appeals. That the Court today chooses to reverse summarily instead of remanding in light of *Barclay*, not only contradicts our general practice, but also demonstrates once again the Court's disquieting readiness to dispose of cases involving the death penalty on the merits without benefit of full briefing or oral argument. See *Maggio* v. *Williams*, *ante*, p. 56 (BRENNAN, J., dissenting).

I dissent.

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82-799. Argued October 11, 1983—Decided November 29, 1983

The Civil Service Reform Act of 1978 (Act) in 5 U. S. C. § 7131(a) (1982 ed.) requires federal agencies to grant to employees representing their union in collective bargaining with the agencies "official time . . . during the time the employee otherwise would be in a duty status." This allows the employee negotiators to be paid as if they were at work, whenever they bargain during hours when they would otherwise be on duty. The Federal Labor Relations Authority (FLRA), in an "Interpretation and Guidance" of general applicability, construed § 7131(a)'s grant of official time as also entitling employee negotiators to a per diem allowance and reimbursement for travel expenses incurred in connection with collective bargaining. In this case, the Court of Appeals enforced an FLRA order requiring petitioner federal agency to pay an employee union representative per diem and travel expenses in addition to his salary, finding the FLRA's interpretation of the statute "reasonably defensible."

Held: The FLRA's interpretation of § 7131(a) constitutes an "unauthorized assumption by [the] agency of [a] major policy decisio[n] properly made by Congress," *American Ship Building Co.* v. *NLRB*, 380 U. S. 300, 318. Pp. 96–108.

(a) While reviewing courts should uphold an agency's reasonable and defensible constructions of its enabling statute, they must not "rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute," *NLRB* v. *Brown*, 380 U. S. 278, 291–292. Pp. 96–98.

(b) Here, there are no indications in the Act or its legislative history that Congress intended employee negotiators to be allowed per diem and travel expenses on the theory that they are engaged in Government business. The Act's declaration that collective bargaining contributes to efficient government and therefore serves the public interest does not reflect a dramatic departure from the principles which applied prior to passage of the Act pursuant to a program established by an Executive Order and under which employee negotiators had not been regarded as working for the Government. Nor do the specific provisions of the Act aimed at equalizing the positions of management and labor suggest that

Congress intended employee negotiators to be treated as though they were "on the job" for all purposes. The qualifying language of § 7131(a) under which the right to a salary is conferred only when "the employee otherwise would be in a duty status" strongly suggests that the employee negotiator is not considered *in* a duty status while engaged in collective bargaining and thereby entitled to all of the normal forms of compensation. Pp. 102–106.

(c) The FLRA's interpretation of § 7131(a) is not supported by the Travel Expense Act, 5 U. S. C. § 5702(a) (1982 ed.), which authorizes a per diem allowance for a federal employee "traveling on official business away from his designated post of duty." Neither Congress' declaration that collective bargaining is in the public interest nor its use of the term "official time" warrants the conclusion that employee negotiators are on "official business" of the Government. Pp. 106–107.

672 F. 2d 732, reversed.

BRENNAN, J., delivered the opinion for a unanimous Court.

Carolyn F. Corwin argued the cause for petitioner. With her on the briefs were *Solicitor General Lee, Assistant Attorney General McGrath, Deputy Solicitor General Geller, William Kanter,* and *Douglas Letter.*

Ruth E. Peters argued the cause for respondents. *Steven H. Svartz* and *William E. Persina* filed a brief for respondent Federal Labor Relations Authority. *Robert M. Tobias, Lois G. Williams,* and *Kerry L. Adams* filed a brief for respondent National Treasury Employees Union.*

JUSTICE BRENNAN delivered the opinion of the Court.

Title VII of the Civil Service Reform Act of 1978 (Act), Pub. L. 95–454, 92 Stat. 1214, 5 U. S. C. § 7131(a) (1982 ed.), requires federal agencies to grant "official time" to employees

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**Edwin Vieira, Jr.*, filed a brief for the Public Service Research Council as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Federation of Government Employees, AFL–CIO, by *Mark D. Roth* and *James R. Rosa;* and for the National Federation of Federal Employees by *Catherine Waelder.*

representing their union in collective bargaining with the agencies. The grant of official time allows the employee negotiators to be paid as if they were at work, whenever they bargain during hours when they would otherwise be on duty. The Federal Labor Relations Authority (FLRA or Authority) concluded that the grant of official time also entitles employee union representatives to a per diem allowance and reimbursement for travel expenses incurred in connection with collective bargaining. 2 F. L. R. A. 265 (1979). In this case, the Court of Appeals for the Ninth Circuit enforced an FLRA order requiring an agency to pay a union negotiator travel expenses and a per diem, finding the Authority's interpretation of the statute "reasonably defensible." 672 F. 2d 732, 733 (1982). Three other Courts of Appeals have rejected the FLRA's construction of the Act.[1] We granted certiorari to resolve this conflict, 459 U. S. 1145 (1983), and now reverse.

I

A

Title VII of the Civil Service Reform Act, part of a comprehensive revision of the laws governing the rights and obligations of civil servants, contains the first statutory scheme governing labor relations between federal agencies and their employees. Prior to enactment of Title VII, labor-management relations in the federal sector were governed by a program established in a 1962 Executive Order.[2] The Executive Order regime, under which federal employees had limited rights to engage in concerted activity, was most recently administered by the Federal Labor Relations Council, a body composed of three Executive Branch management officials whose decisions were not subject to judicial review.[3]

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[1] *Florida National Guard* v. *FLRA*, 699 F. 2d 1082 (CA11 1983), cert. pending, No. 82-1970; *United States Dept. of Agriculture* v. *FLRA*, 691 F. 2d 1242 (CA8 1982), cert. pending, No. 82-979; *Division of Military & Naval Affairs* v. *FLRA*, 683 F. 2d 45 (CA2 1982), cert. pending, No. 82-1021.

[2] Exec. Order No. 10988, 3 CFR 521 (1959-1963 Comp.). The Executive Order program was revised and continued by Exec. Order No. 11491, 3 CFR 861 (1966-1970 Comp.), as amended by Exec. Orders Nos. 11616, 11636, and 11838, 3 CFR 605, 634, 957 (1971-1975 Comp.).

The new Act, declaring that "labor organizations and collective bargaining in the civil service are in the public interest," 5 U. S. C. § 7101(a) (1982 ed.), significantly strengthened the position of public employee unions while carefully preserving the ability of federal managers to maintain "an effective and efficient Government," § 7101(b).[4] Title VII expressly protects the rights of federal employees "to form, join, or assist any labor organization, or to refrain from any such activity," § 7102, and imposes on federal agencies and labor organizations a duty to bargain collectively in good faith, §§ 7116(a)(5) and (b)(5). The Act excludes certain management prerogatives from the scope of negotiations, although an agency must bargain over the procedures by which these management rights are exercised. See § 7106. In general, unions and federal agencies must negotiate over terms and conditions of employment, unless a bargaining proposal is inconsistent with existing federal law, rule, or regulation. See §§ 7103(a), 7114, 7116, and 7117(a). Strikes and certain other forms of concerted actitivies by federal employees are illegal and constitute unfair labor practices under the Act, § 7116(b)(7)(A).

The Act replaced the management-controlled Federal Labor Relations Council with the FLRA, a three-member independent and bipartisan body within the Executive Branch with responsibility for supervising the collective-bargaining process and administering other aspects of federal labor relations established by Title VII. § 7104. The Authority, the role of which in the public sector is analogous to that of the National Labor Relations Board in the private sector, see H. R. Rep. No. 95–1403, p. 41 (1978), adjudicates negotiability disputes, unfair labor practice complaints, bargaining unit issues, arbitration exceptions, and conflicts over the conduct of representational elections. See §§ 7105(a)(2)(A)–(I). In addition to its adjudicatory functions, the Authority may engage in formal rulemaking, § 7134, and is specifically required to "provide leadership in establishing policies and guidance relating to matters" arising under the Act, § 7105(a)(1). The FLRA may seek enforcement of its adjudicatory orders in the United States courts of appeals, § 7123(b), and persons, including federal agencies, aggrieved by any final FLRA decision may also seek judicial review in those courts, § 7123(a).

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[3] The Council was established by Executive Order No. 11491 in 1970.

[4] Certain federal employees, including members of the military and the Foreign Service, and certain federal agencies, including the Federal Bureau of Investigation and the Central Intelligence Agency, are excluded from the coverage of Title VII. 5 U. S. C. §§ 7102(a)(2) and (3) (1982 ed.).

B

Petitioner, the Bureau of Alcohol, Tobacco and Firearms (BATF or Bureau), an agency within the Department of the Treasury, maintained a regional office in Lodi, California. Respondent National Treasury Employees Union (NTEU or Union) was the exclusive representative of BATF employees stationed in the Lodi office. In November 1978, the Bureau notified NTEU that it intended to move the Lodi office to Sacramento and to establish a reduced duty post at a new location in Lodi. The Union informed BATF that it wished to negotiate aspects of the move's impact on employees in the bargaining unit. As its agent for these negotiations, the Union designated Donald Pruett, a BATF employee and NTEU steward who lived in Madera, California, and was stationed in Fresno. Bureau officials agreed to meet with Pruett at the new offices and discuss the planned move. Pruett asked that his participation in the discussions be classified as "official time" so that he could receive his regular salary while attending the meetings. The Bureau denied the request and directed Pruett to take either annual leave or leave without pay for the day of the meeting.

On February 23, 1979, Bureau officials met with Pruett at the proposed new Sacramento offices and inspected the physical amenities, including the restrooms, dining facilities, and parking areas. Pruett and the BATF officials then drove to Lodi where they conducted a similar inspection of the new reduced duty post. Finally, the group repaired to the existing Lodi office where they discussed the planned move. After Pruett expressed his general satisfaction with the new facilities, he negotiated with the agency officials about such matters as parking arrangements, employee assignments, and the possibility of excusing employee tardiness for the first week of operations in the Sacramento office. Once the parties reached an agreement on the move, Pruett drove back to his home in Madera.

Pruett had spent 11½ hours traveling to and attending the meetings, and had driven more than 300 miles in his own car. When he renewed his request to have his participation at the meetings classified as official time, the Bureau informed him that it did not reimburse employees for expenses incurred in negotiations and that it granted official time only for quarterly collective-bargaining sessions and not for midterm discussions like those involved here. In June 1979, the Union filed an unfair labor practice charge with the FLRA, claiming that BATF had improperly compelled Pruett to take annual leave for the February 23 sessions.

While the charge was pending, the FLRA issued an "Interpretation and Guidance" of general applicability which required federal agencies to pay salaries, travel expenses, and per diem allowances to union representatives engaged in collective bargaining with the agencies.[5] 2 F. L. R. A. 265 (1979). The Interpretation relied on 5 U. S. C. §7131(a)

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[5] Although the Authority invited interested persons to express their views prior to adoption of the Interpretation, see Notice Relating to Official Time, 44 Fed. Reg. 42788 (1979), the decision apparently was issued not under the FLRA's statutory power to promulgate regulations, §7134, but rather under §7105(a)(1), which requires the Authority to provide leadership in establishing policies and guidance relating to federal labor-management relations. See Brief for Respondent FLRA 11, n. 10.

(1982 ed.), which provides that "[a]ny employee representing an exclusive representative in the negotiation of a collective bargaining agreement . . . shall be authorized official time for such purposes . . . ." The Authority concluded that an employee's entitlement to official time under this provision extends to "all negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement." 2 F. L. R. A., at 268. The Authority further determined that § 7131(a) requires agencies to pay a per diem allowance and travel expenses to employees representing their union in such negotiations. *Id.*, at 270.

Based on the NTEU's pending charge against the Bureau, the General Counsel of the Authority issued a complaint and notice of hearing, alleging that the BATF had committed an unfair labor practice by refusing to grant Pruett official time for the February 23 meetings.[6] During the course of a subsequent hearing on the charge before an Administrative Law Judge, the complaint was amended to add a claim that, in addition to paying Pruett's salary for the day of the meetings, the BATF should have paid his travel expenses and a per diem allowance. Following the hearing, the ALJ determined that negotiations had in fact taken place between Pruett and BATF officials at the February 23 meetings. Bound to follow the recent FLRA Interpretation and Guidance, the ALJ concluded that the Bureau had committed an unfair labor practice by failing to comply with § 7131(a). Accordingly, he ordered the Bureau to pay Pruett his regular salary for the day in question, as well as his travel costs and a per diem allowance. The ALJ also required the BATF to post a notice stating that the agency would do the same for all employee union representatives in future negotiations. The Bureau filed exceptions to the decision with the Authority, which, in September 1980, affirmed the decision of the ALJ, adopting his findings, conclusions, and recommended relief. 4 F. L. R. A. 288 (1980).

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[6] Title 5 U. S. C. § 7118 (1982 ed.) provides in part:

"(a)(1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. . . ."

The complaint issued by the General Counsel in this case relied on § 7116, which provides in part:

"(a) For the purposes of this chapter, it shall be an unfair labor practice for an agency—

"(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

* * * * *

"(8) to otherwise fail or refuse to comply with any provision of this chapter."

The Bureau sought review in the United States Court of Appeals for the Ninth Circuit, and the Union intervened as a party in that appeal. The Bureau challenged both the FLRA's conclusion that § 7131(a) applies to midterm negotiations and its determination that the section requires payment of travel expenses and a per diem allowance. After deciding that the Authority's construction of its enabling Act was entitled to deference if it was "reasoned and supportable," 672 F. 2d, at 735–736, the Court of Appeals enforced the Authority's order on both issues. *Id.*, at 737, 738. On certiorari to this Court, petitioner does not seek review of the holding with respect to midterm negotiations. Only that aspect of the Court of Appeals' decision regarding travel expenses and per diem allowances is at issue here.

II

The FLRA order enforced by the Court of Appeals in this case was, as noted, premised on the Authority's earlier construction of § 7131(a) in its Interpretation and Guidance. Although we have not previously had occasion to consider an interpretation of the Civil Service Reform Act by the FLRA, we have often described the appropriate standard of judicial review in similar contexts.[7] Like the National Labor Relations Board, see, *e. g.*, *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, 236 (1963), the FLRA was intended to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the Act. See § 7105; H. R. Rep. No. 95–1403, p. 41 (1978). Consequently, the Authority is entitled to considerable deference when it exercises its "special function of applying the general provisions of the Act to the complexities" of federal labor relations. Cf. *NLRB* v. *Erie Resistor Corp.*, *supra*, at 236. See also *Ford Motor Co.* v. *NLRB*, 441 U. S. 488, 496 (1979); *NLRB* v. *Iron Workers*, 434 U. S. 335, 350 (1978); *NLRB* v. *Truck Drivers*, 353 U. S. 87, 96 (1957).

On the other hand, the "deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Ship Building Co.* v. *NLRB*, 380 U. S. 300, 318 (1965). Accordingly, while reviewing courts should uphold reasonable and defensible constructions of an agency's enabling Act, *NLRB* v. *Iron Workers*, *supra*, at 350, they must not "rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *NLRB* v. *Brown*, 380 U. S. 278, 291–292 (1965). See *Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157,

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[7] The decisions of the FLRA are subject to judicial review in accordance with the Administrative Procedure Act (APA), 5 U. S. C. § 706. See 5 U. S. C. § 7123(c) (1982 ed.). The APA requires a reviewing court to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." § 706. The court must set aside agency actions and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." §§ 706(2)(A) and (C).

166 (1971).[8] Guided by these principles, we turn to a consideration of the FLRA's construction of § 7131(a).

III

Title 5 U. S. C. § 7131(a) (1982 ed.) provides in full:

> "Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement

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[8] Petitioner suggests that we should accord little deference to the Authority's decision in this case for two reasons. First, petitioner contends that the FLRA's conclusion that employee negotiators are entitled to travel expenses and a per diem allowance was based largely on the Authority's reading of the Travel Expense Act, 5 U. S. C. § 5702 (1982 ed.), a statute the FLRA does not administer. As we understand the FLRA's decision, however, the Authority's view that the Travel Expense Act supported its conclusion derived primarily from its interpretation of § 7131(a). See *infra*, at 106.

Second, petitioner argues that the Interpretation and Guidance is entitled to less weight since it was apparently an "interpretative rule" rather than an "administrative regulation." See n. 5, *supra*. Congress did, however, afford the FLRA broad authority to establish policies consistent with the Act, see §§ 7105 and 7134, and the Interpretation and Guidance was attended by at least some of the procedural characteristics of a rulemaking. See n. 5, *supra*. See 5 U. S. C. § 553. Compare *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U. S. 27, 37 (1981), with *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 141–142 (1976). In any event, we find it unnecessary to rest our decision on a precise classification of the FLRA's action. As we explain in the text, an agency acting within its authority to make policy choices consistent with the congressional mandate should receive considerable deference from courts, provided, of course, that its actions conform to applicable procedural requirements and are not "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law," 5 U. S. C. § 706(2)(A). See, *e. g.*, *Batterton* v. *Francis*, 432 U. S. 416, 424–426 (1977); *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137–138 (1940). When an agency's decision is premised on its understanding of a specific congressional intent, however, it engages in the quintessential judicial function of deciding what a statute means. In that case, the agency's interpretation, particularly to the extent it rests on factual premises within its expertise, may be influential, but it cannot bind a court. *General Electric Co.* v. *Gilbert*, *supra; Zuber* v. *Allen*, 396 U. S. 168, 192–193 (1969); *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944). For the reasons set out below, we conclude that the FLRA's decision in this case neither rests on specific congressional intent nor is consistent with the policies underlying the Act.

> under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes."

According to the House Committee that reported the bill containing § 7131, Congress used the term "official time" to mean "paid time." See H. R. Rep. No. 95–1403, p. 58 (1978). In light of this clear expression of congressional intent, the parties agree that employee union negotiators are entitled to their usual pay during collective-bargaining sessions that occur when the employee "otherwise would be in a duty status." Both the Authority, 2 F. L. R. A., at 269, and the Court of Appeals, 672 F. 2d, at 737, recognized that there is no corresponding expression, either in the statute or the extensive legislative history, of a congressional intent to pay employee negotiators travel expenses and per diem allowances as well.

Despite this congressional silence, respondents advance several reasons why the FLRA's determination that such payments are required is consistent with the policies underlying the Act. Each of these arguments proceeds from the assumption that, by providing employee negotiators with official time for bargaining, Congress rejected the model of federal labor relations that had shaped prior administrative practice. In its place, according to respondents, Congress substituted a new vision of collective bargaining under which employee negotiators, like management representatives, are considered "on the job" while bargaining and are therefore entitled to all customary forms of compensation, including travel expenses and per diem allowances.[9] In order to evaluate this claim, it is necessary briefly to review the rights of employee negotiators to compensation prior to adoption of the Act.

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[9] In the Interpretation and Guidance, the FLRA also noted that it had previously construed § 7131(c), which authorizes "official time" for em-

A

Under the 1962 Executive Order establishing the first federal labor relations program, the decision whether to pay union representatives for the time spent in collective bargaining was left within the discretion of their employing agency,[10] apparently on the ground that, without some control by management, the length of such sessions could impose too great a burden on Government business. See Report of the President's Task Force on Employee-Management Relations in the Federal Service, reprinted in Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, pp. 1177, 1203 (Comm. Print 1979) (hereinafter Leg. Hist.). Under this early scheme, employee negotiators were not entitled to per diem allowances and travel expenses, on the view that they were engaged, not in official business of the Government, but rather in activities "primarily in the interest of the employee organization." 44 Comp. Gen. 617, 618 (1965).[11]

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ployee representatives appearing before the Authority, to require the payment of travel expenses and a per diem allowance. 2 F. L. R. A. 265, 270 (1979). See 5 CFR § 2429.13 (1983). The fact that the Authority interpreted two similar provisions of the Act consistently does not, however, demonstrate that either interpretation is correct. We, of course, express no view as to whether different considerations uniquely applicable to proceedings before the Authority might justify the FLRA's interpretation of § 7131(c).

[10] Section 9 of Executive Order No. 10988 encouraged agencies to conduct general consultations with labor representatives on official time, but left them free to conduct collective-bargaining sessions "during the non-duty hours of the employee organization representatives involved in such negotiations." 3 CFR 521, 524–525 (1959–1963 Comp.).

[11] The 1962 Executive Order contained no reference to travel expenses or per diem allowances. The decision that such payments were not available was made in 1965 by the Comptroller General, 44 Comp. Gen. 617, who is authorized to give agencies guidance concerning such disburse-

Executive Order No. 11491, which became effective in 1970, cut back on the previous Order by providing that employees engaged in negotiations with their agencies could not receive official time, even at the agencies' discretion. See 3 CFR 861–862, 873–874 (1966–1970 Comp.). Again, the prohibition was based on the view that employee representatives work for their union, not for the Government, when negotiating an agreement with their employers. See Leg. Hist., at 1167. In 1971, however, at the recommendation of the Federal Labor Relations Council, an amending Executive Order allowed unions to negotiate with agencies to obtain official time for employee representatives, up to a maximum of either 40 hours, or 50% of the total time spent in bargaining. Exec. Order No. 11616, 3 CFR 605 (1971–1975 Comp.). The Council made clear that this limited authorization, which was intended "to maintain a reasonable policy with respect to union self-support and an incentive to economical and businesslike bargaining practices," Leg. Hist., at 1169, did not permit "[o]vertime, premium pay, or travel expenditures." *Id.*, at 1264.

The Senate version of the bill that became the Civil Service Reform Act would have retained the last Executive Order's restrictions on the authorization of official time. S. Rep.

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ments. See 31 U. S. C. § 3529 (1982 ed.). The following year, the Comptroller General modified his position and approved new guidelines issued by the Civil Service Commission. 46 Comp. Gen. 21, 21–22. The guidelines provided that, while employees should not generally be allowed travel expenses to attend negotiations, such expenses would be approved if an agency head certified that the employee representatives' travel would be in the "primary interest of the Government." *Ibid.* An agency might make such a certification when, for example, it would be more convenient for management to meet at a particular site and more economical to pay the employees' costs of traveling there than to pay the cost for agency representatives to travel to a different site. *Ibid.* This exception to the earlier prohibition on travel expenses was, by its terms, consistent with the Comptroller General's view that employee negotiators act principally in the interest of their union and not on official business for the United States.

No. 95–969, p. 112 (1978). Congress instead adopted the section in its present form, concluding, in the words of one Congressman, that union negotiators "should be allowed official time to carry out their statutory representational activities just as management uses official time to carry out its responsibilities." 124 Cong. Rec. 29188 (1978) (remarks of Rep. Clay). See H. R. Conf. Rep. No. 95–1717, p. 111 (1978).

B

Respondents suggest that, by rejecting earlier limitations on official time, Congress repudiated the view that employee negotiators work only for their union and not for the Government. Under the new vision of federal labor relations postulated by respondents, civil servants on both sides of the bargaining table are engaged in official business of the Government and must be compensated equally. Because federal employees representing the views of management receive travel expenses and per diem allowances, federal employees representing the views of labor are entitled to such payments as well. In support of this view, respondents rely on the Act's declaration that public sector collective bargaining is in "the public interest" and "contributes to the effective conduct of public business," § 7101(a), as well as on a number of specific provisions in the Act intended to equalize the position of management and labor. For instance, the Act requires agencies to deduct union dues from employees' paychecks and to transfer the funds to the union at no cost, § 7115(a);[12] in addition, agencies must furnish a variety of data useful to unions in the collective-bargaining process, § 7114(b)(4). Respondents also contend that Congress employed the term "official time" in § 7131 specifically to indicate that employee negotiators are engaged in Government business and therefore entitled to all of their usual forms of compensation.

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[12] Under the Executive Order regime, unions had to negotiate for dues deductions and were generally charged a fee for the service. See *Information Announcement*, 1 F. L. R. C. 676, 677 (1973).

Although Congress certainly could have adopted the model of collective bargaining advanced by respondents, we find no indications in the Act or its legislative history that it intended to do so. The Act's declaration that collective bargaining contributes to efficient government and therefore serves the public interest does not reflect a dramatic departure from the principles of the Executive Order regime under which employee negotiators had not been regarded as working for the Government. To the contrary, the declaration constitutes a strong congressional endorsement of the policy on which the federal labor relations program had been based since its creation in 1962. See, *e. g.*, Exec. Order No. 10988, 3 CFR 521 (1959–1963 Comp.) ("participation of employees in the formulation and implementation of personnel policies affecting them contributes to effective conduct of public business"); Exec. Order No. 11491, 3 CFR 861 (1966–1970 Comp.) ("public interest requires . . . modern and progressive work practices to facilitate improved employee performance and efficiency" and efficient government is "benefited by providing employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment"). See also S. Rep. No. 95–969, p. 12 (1978); 124 Cong. Rec. 29182 (1978) (remarks of Rep. Udall) ("What we really do is to codify the 1962 action of President Kennedy in setting up a basic framework of collective bargaining for Federal employees").[13]

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[13] We do not read Representative Udall's remarks to suggest that the Authority is bound by administrative decisions made under the Executive Order regime. The Act explicitly encourages the Authority to establish policies and provide guidance in the federal labor relations field, § 7105(a)(1), and there are undoubtedly areas in which the FLRA, like the National Labor Relations Board, enjoys considerable freedom to apply its expertise to new problems, provided it remains faithful to the fundamental policy choices made by Congress. See *supra*, at 96–98, and n. 8. See also § 7135(b) (decisions under Executive Order regime remain in effect unless revised by President or superseded by Act or regulations or decisions thereunder).

Nor do the specific provisions of the Act aimed at equalizing the positions of management and labor suggest that Congress intended employee representatives to be treated as though they were "on the job" for all purposes. Indeed, the Act's provision of a number of specific subsidies for union activities supports precisely the opposite conclusion. As noted above, Congress expressly considered and ultimately rejected the approach to paid time that had prevailed under the Executive Order regime. See *supra*, at 101–102. In contrast, there is no reference in the statute or the legislative history to travel expenses and per diem allowances, despite the fact that these kinds of payments had also received administrative attention prior to passage of the Act, see *supra*, at 100, and n. 11. There is, of course, nothing inconsistent in paying the salaries, but not the expenses, of union negotiators. Congress might well have concluded that, although union representatives should not be penalized by a loss in salary while engaged in collective bargaining, they need not be further subsidized with travel and per diem allowances. The provisions of the Act intended to facilitate the collection of union dues, see § 7115, certainly suggest that Congress contemplated that unions would ordinarily pay their own expenses.

Respondents also find their understanding of the role of union representatives supported by Congress' use of the phrase "official time" in § 7131(a). For respondents, the use of this term indicates an intent to treat employee negotiators "as doing the government's work for all the usual purposes," and therefore entitled to "all attributes of employment," including travel expenses and a per diem allowance. Brief for Respondent NTEU 24–28. They suggest that, if Congress intended to maintain only the employees' salaries, it would have granted them "leave without loss of pay," a term it has used in other statutes. See, *e. g.*, 5 U. S. C. § 6321 (absence of veterans to attend funeral services), § 6322(a) (jury or witness duty), and § 6323 (military reserve duty) (1982 ed.). In contrast, Congress uses the terms "official capacity" and "duty status" to indicate that an employee is "on the job" and entitled to all the usual liabilities and privileges of employment. See, *e. g.*, §§ 5751, 6322(b) (employee summoned to testify in "official capacity" entitled to travel expenses).[14]

The difficulty with respondents' argument is that Congress did not provide that employees engaged in collective bargaining are acting in their "official capacity," "on the job," or in a "duty status." Instead, the right to a salary conferred by § 7131(a) obtains only when "the employee *otherwise* would be in a duty status" (emphasis supplied). This qualifying language strongly suggests that union negotiators engaged in collective bargaining are not considered *in* a duty status and thereby entitled to all of their normal forms of compensation. Nor does the phrase "official time," borrowed from prior administrative practice, have the same meaning as "official capacity."[15] As noted above, employees on "official time" under the Executive Order regime were not generally entitled to travel expenses and a per diem allowance. See *supra*, at 100–101. Moreover, as respondents' own examples demonstrate, Congress does not rely on the mere use of the word "official" when it intends to allow travel expenses and per diems. Even as to those employees acting in an "official capacity," Congress generally provides explicit authorization for such payments. See, *e. g.*, §§ 5702, 5751(b), 6322(b). In the Civil Service Reform Act itself, for instance, Congress expressly provided that members of the Federal Service

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[14] The Authority seemed to rely on this distinction between "duty status" and "leave" in its Interpretation when it stated that an employee negotiator "is on paid time entitled to his or her usual compensation and is not in leave status." 2 F. L. R. A., at 269.

[15] Similarly, the statement of Representative Clay that employee representatives "should be allowed official time to carry out their statutory representational activities just as management uses official time to carry out its responsibilities," 124 Cong. Rec. 29188 (1978), does not indicate that Congress intended union representatives to be treated as if they are "at work" for all purposes.

Impasses Panel are entitled to travel expenses and a per diem allowance, in addition to a salary. See §§ 5703, 7119(c)(4).[16]

Perhaps recognizing that authority for travel expenses and per diem allowances cannot be found within the four corners of § 7131(a), respondents alternatively contend that the Authority's decision is supported by the Travel Expense Act, 5 U. S. C. § 5702(a) (1982 ed.), which provides that a federal employee "traveling on official business away from his designated post of duty . . . is entitled to . . . a per diem allowance." The Travel Expense Act is administered by the Comptroller General who has concluded that agencies may authorize per diem allowances for travel that is "sufficiently in the interest of the United States so as to be regarded as official business." 44 Comp. Gen. 188, 189 (1964). Under the Executive Order regime, the Comptroller General authorized per diem payments to employee negotiators pursuant to this statute upon a certification that the employees' travel served the convenience of the employing agency. See n. 11, *supra.*

Based on its view that employee negotiators are "on the job," the Authority determined that union representatives engaged in collective bargaining are on "official business" and therefore entitled to a per diem allowance under the Travel Expense Act. 2 F. L. R. A., at 269. In support of this reasoning, the Authority notes that § 5702(a) has been construed broadly to authorize reimbursement in connection with a variety of "quasi-official" activities, such as employees' attendance at their own personnel hearings and at privately sponsored conferences. See, *e. g.*, Comptroller General of the United States, Travel in the Management and Operation of Federal Programs 1, App. I, p. 5 (Rpt. No. FPCD–77–11, Mar. 17, 1977); 31 Comp. Gen. 346 (1952). In each of these instances, however, the travel in question was presumably for the convenience of the agency and therefore clearly constituted "official business" of the Government. As we have explained, neither Congress' declaration that collective bargaining is in the public interest nor its use of the term of art "official time" warrants the conclusion that employee negotiators are on "official business" of the Government.[17]

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[16] As further support for their reading of "official time," respondents contend that union representatives engaged in collective bargaining may be entitled to benefits under the Federal Employees' Compensation Act, 5 U. S. C. § 8101 *et seq.* (1982 ed.), and may create Government liability under the Federal Tort Claims Act, 28 U. S. C. § 1346(b) (1976 ed. and Supp. V). The fact that other federal statutes, with different purposes, may be construed to apply to employee negotiators, however, does not demonstrate that, in enacting the Civil Service Reform Act, Congress intended to treat union negotiators as engaged in official business of the Government.

IV

In passing the Civil Service Reform Act, Congress unquestionably intended to strengthen the position of federal unions and to make the collective-bargaining process a more effective instrument of the public interest than it had been under the Executive Order regime. See *supra*, at 91–93. There is no evidence, however, that the Act departed from the basic assumption underlying collective bargaining in both the public and the private sector that the parties "proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest." *NLRB* v. *Insurance Agents*, 361 U. S. 477, 488 (1960), quoted in *General Building Contractors Assn., Inc.* v. *Pennsylvania*, 458 U. S. 375, 394 (1982). Nor did the Act confer on the FLRA an unconstrained authority to equalize the economic positions of union and management. See *American Ship Building Co.* v. *NLRB*, 380 U. S., at 316–318. We conclude, therefore, that the FLRA's interpretation of § 7131(a) constitutes an "unauthorized assumption by [the] agency of [a] major policy decisio[n] properly made by Congress." *Id.*, at 318.

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[17] Our conclusion that federal agencies may not be required under § 7131(a) to pay the travel expenses and per diem allowances of union negotiators does not, of course, preclude an agency from making such payments upon a determination that they serve the convenience of the agency or are otherwise in the primary interest of the Government, as was the practice prior to passage of the Act. See n. 11, *supra*. Furthermore, unions may presumably negotiate for such payments in collective bargaining as they do in the private sector. See *Midstate Tel. Corp.* v. *NLRB*, 706 F. 2d 401, 405 (CA2 1983); *Axelson, Inc.* v. *NLRB*, 599 F. 2d 91, 93–95 (CA5 1979). Indeed, we are informed that many agencies presently pay the travel expenses of employee representatives pursuant to collective-bargaining agreements. Letter from Ruth E. Peters, Counsel for Respondent FLRA, Nov. 9, 1983. See also *J. P. Stevens & Co.*, 239 N. L. R. B. 738, 739 (1978) (employer required to pay travel expenses as remedy for failing to bargain in good faith).

The judgment of the Court of Appeals is

Reversed.

SULLIVAN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.

ON APPLICATION FOR STAY

No. A–409. Decided November 29, 1983

In 1973, applicant was convicted of murder in a Florida state court and sentenced to death. The Florida Supreme Court affirmed, and this Court denied certiorari. After exhausting state postconviction remedies, applicant filed a habeas corpus petition in Federal District Court, which denied the writ. The Court of Appeals affirmed, and this Court denied certiorari. After another petition for postconviction relief in state court was denied in 1983 and affirmed on appeal, applicant filed a second habeas corpus petition in Federal District Court, which again declined to issue the writ, and the Court of Appeals affirmed. Applicant then filed the instant application for a stay of execution with the Circuit Justice, who referred it to the Court. Applicant raises five claims: (1) denial of the right to counsel; (2) denial of the effective assistance of counsel; (3) the jury that convicted him was biased in the prosecution's favor; (4) denial of proportionality review; and (5) the Florida death penalty statute has been applied discriminatorily against blacks.

Held: The application for a stay of execution is denied. The first three claims raised by applicant were presented several times previously in both the state and federal courts, and have been found to be meritless. The fourth claim was found meritless by the Florida Supreme Court, and that ruling will not be disturbed. The fifth claim, first raised in applicant's most recent state habeas corpus petition, was based on data that were available long before that time and that the Florida Supreme Court and both federal courts below have determined to be insufficient to show that the Florida system is unconstitutionally discriminatory.

Application for stay denied.

PER CURIAM.

Applicant was sentenced to death in November 1973 for the murder of the manager of a restaurant he had robbed. His conviction and sentence were affirmed by the Florida Supreme Court and this Court denied certiorari. *Sullivan* v. *State*, 303 So. 2d 632 (Fla. 1974), cert. denied, 428 U. S. 911 (1976). After exhausting state postconviction remedies, *Sullivan* v. *State*, 372 So. 2d 938 (Fla. 1979), applicant filed his first habeas petition in 1979.[1] The District Court held an evidentiary hearing and denied the writ. The Eleventh Circuit affirmed, and this Court denied certiorari. *Sullivan* v. *Wainwright*, 695 F. 2d 1306 (CA11 1983), cert. denied, *post*, p. 922. In October 1983, applicant filed his second petition for postconviction relief in state court. The denial of that relief was affirmed on appeal, *Sullivan* v. *State*, 441 So. 2d 609 (Fla. 1983), and applicant filed a second petition for writ of habeas corpus in the federal court. Following a hearing, the District Court declined to issue the writ, and refused to issue a stay of execution or a certificate of probable cause to appeal. The Eleventh Circuit affirmed, with one judge dissenting in part. That court issued a temporary stay in order to allow a vote on applicant's suggestion for rehearing en banc. That stay was lifted when the suggestion was denied.[2]

This application for a stay pending completion of the rehearing vote was presented to JUSTICE POWELL as Circuit Justice on November 28, 1983. Counsel requested that the papers be treated as an application for a stay pending filing of a writ of certiorari under 28 U. S. C. § 2101(f), and JUSTICE POWELL referred the application to the Court.

Applicant raises essentially five claims: (i) that he was denied the right to counsel; (ii) that he was denied effective assistance of counsel; (iii) that the jury that convicted him was biased in favor of the prosecution; (iv) that he was denied proportionality review; and (v) that the Florida death penalty statute has been applied discriminatorily against blacks.

The first three of these claims have been presented several times previously in both state and federal courts and have been found to be meritless. Applicant's claim that he was entitled to proportionality review was addressed and found meritless by the Florida Supreme Court. *Id.*, at 613–614. His case was one of the earliest to be decided under Florida's current death penalty statute. The State Supreme Court has used it as a reference point, comparing all subsequent capital cases to applicant's case to ensure proportionality. It therefore cannot be alleged that the State has failed to compare this sentence with others decided under this statute to ensure proportionality. Whatever our decision in *Pulley* v. *Harris*, No. 82–1095 (cert. granted, 460 U. S. 1036 (1983)), may be, it will not disturb the Florida Supreme Court's ruling.

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[1] In addition, applicant was a plaintiff in an action attacking the Florida executive-clemency procedure. See *Sullivan* v. *Askew*, 348 So. 2d 312 (Fla.), cert. denied, 434 U. S. 878 (1977).

[2] Applicant's case has been considered by at least 10 state and federal courts other than this one, and twice before by this Court.

Applicant apparently first raised the issue of discriminatory application of the statute in a supplement to his most recent state habeas corpus petition, which was filed on November 15, 1983. Counsel for applicant, who is white, present voluminous statistics that they say support the claim of discriminatory application of the death sentence. Although some of the statistics are relatively new, many of the studies were conducted years ago and were available to applicant long before he filed his most recent state and federal habeas petitions. The Florida Supreme Court and both the Federal District Court and the Eleventh Circuit have considered these data and determined in written opinions that they are insufficient to show that the Florida system is unconstitutionally discriminatory. On the basis of the record before this Court, we find there is no basis for disagreeing in this case with their decisions.[3]

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[3] Judge Anderson dissented in the court below on the ground that the statistics presented in this case were equal in quality to those presented with respect to Georgia's death penalty statute in *Spencer* v. *Zant*, 715 F. 2d 1562, 1578–1583 (CA11 1983). In that case and the companion case of *Ross* v. *Hopper*, 716 F. 2d 1528, 1539 (CA11 1983), the Eleventh Circuit remanded the statistical claim to the District Court for a hearing. This case is different from those because in this case both of the lower courts, as

This case has been in litigation for a full decade, with repetitive and careful reviews by both state and federal courts, and by this Court. There must come an end to the process of consideration and reconsideration. We recognize, of course, as do state and other federal courts, that the death sentence is qualitatively different from all other sentences, and therefore special care is exercised in judicial review.

The application for a stay of execution is denied.

It is so ordered.

JUSTICE WHITE and JUSTICE STEVENS concur in the denial of a stay.

CHIEF JUSTICE BURGER, concurring.

In joining the *per curiam* opinion of the Court, I emphasize that this case has been in the courts for 10 years and is here for the fourth time. This alone demonstrates the speciousness of the suggestion that there has been a "rush to judgment." The argument so often advanced by the dissenters that capital punishment is cruel and unusual is dwarfed by the cruelty of 10 years on death row inflicted upon this guilty defendant by lawyers seeking to turn the administration of justice into the sporting contest that Roscoe Pound denounced three-quarters of a century ago.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

I

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the

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well as this Court, have had the opportunity to consider the statistics. In *Spencer*, the Eleventh Circuit found it "unlikely that the district court could have adequately analyzed the [statistical] evidence insofar as it was not then available except by live testimony." 715 F. 2d, at 1582. The court therefore remanded to the District Court to consider the evidence. *Ross* was treated identically because it had been consolidated with *Spencer* in the District Court. *Ross, supra*, at 1539.

Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would grant the application and stay the execution of applicant Sullivan.

II

Even if I accepted the prevailing view that the death penalty may constitutionally be imposed under certain circumstances, I would grant the application because Sullivan has raised a substantial claim concerning the constitutionality of his death sentence. In particular, Sullivan alleges that application of the Florida death penalty statute violates the Equal Protection Clause because it discriminates against capital defendants solely on the basis of their race and the race of their victims. For support, Sullivan has proffered numerous scholarly studies, several of which are yet to be published, that provide statistical evidence to substantiate his claim. Although the Court has avoided ruling on similar claims in the past, and continues to avoid the issue by its decision tonight, the claim is clearly deserving of further consideration. Indeed, as the Court of Appeals for the Eleventh Circuit has recognized in a similar case, "the merits of this allegation cannot be assessed without a more detailed consideration of the evidence proffered" and therefore the applicant "is entitled to an evidentiary hearing on the merits of the claim as a matter of law." *Spencer* v. *Zant*, 715 F. 2d 1562, 1582–1583 (1983). See *Townsend* v. *Sain*, 372 U. S. 293 (1963).

I see no reason to depart from that sensible approach in this case. In fact, the Court has had only 24 hours to examine the voluminous stay application and exhibits that have been filed on Sullivan's behalf. The haste with which the Court has proceeded in this case means not only that Sullivan's claim has not received the thoughtful consideration to which it is entitled, but also that the Court has once again rushed to judgment, apparently eager to reach a fatal conclusion.

I dissent.

RUSHEN, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* SPAIN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82-2083. Decided December 12, 1983

During *voir dire* prior to the trial in a California court of respondent and others on various charges, including murder and conspiracy allegedly involving the Black Panther Party, a prospective juror (who became a juror) stated that she had no personal knowledge of violent crimes and that she did not associate the Black Panther Party with any form of violence. However, evidence was introduced at the trial concerning an unrelated murder by a Black Panther, triggering the juror's recollection that the victim of the unrelated murder had been the juror's childhood friend and causing her to go twice to the judge's chambers to tell him of her personal acquaintance with the victim. On each occasion she assured the judge—who made no record of the conversations and did not inform the defendants or their counsel about them—that her disposition of the case would not be affected. After respondent was convicted, his counsel learned of the *ex parte* communications between the judge and the juror and moved for a new trial. After a hearing at which the juror testified that her recollection of her friend's death did not affect her impartiality, the judge denied the motion, concluding that the communications lacked significance and that respondent suffered no prejudice therefrom. The California Court of Appeal affirmed, holding that although the communications constituted federal constitutional error, they were harmless "beyond a reasonable doubt." However, respondent subsequently obtained habeas corpus relief in the Federal District Court, which held, *inter alia*, that the *ex parte* communications violated respondent's constitutional rights to be present during critical stages of the proceedings and to be represented by counsel, and that automatic reversal was necessary because the absence of a contemporaneous record made intelligent application of the harmless-error standard impossible. The Court of Appeals affirmed on the basis that an unrecorded *ex parte* communication between trial judge and juror could never be harmless error.

Held: The lower federal courts' conclusion that unrecorded *ex parte* communications between trial judge and juror can never be harmless error ignores the day-to-day realities of courtroom life and undermines society's interest in the administration of criminal justice. When an *ex* *parte* communication relates to some aspect of the trial, the trial judge generally should disclose the communication to counsel for all parties, but the prejudicial effect of a failure to do so can normally be determined by a post-trial hearing. The substance of the communication and its effect on juror impartiality are questions of historical fact, and under 28 U. S. C. § 2254(d) the state courts' findings thereon are entitled to a presumption of correctness and must be deferred to by the federal courts, in the absence of "convincing evidence" to the contrary. The post-trial hearing in this case created more than adequate support for the finding that the juror's presence on the jury did not prejudice respondent. The lower federal courts should have deferred to this presumptively correct state-court finding and therefore should have found the alleged constitutional error harmless beyond a reasonable doubt.

Certiorari granted; 701 F. 2d 186, vacated and remanded.

PER CURIAM.

Respondent was one of six inmates involved in a 1971 San Quentin Prison escape that resulted in the death of three prisoners and three corrections officers. The State of California jointly tried respondent and five other prisoners on numerous charges, including murder, conspiracy, and assault. The prosecution attempted to show that the Black Panther Party had organized the escape attempt and to link respondent to the conspiracy through his membership in that Party. Respondent's defense was that state police had organized the breakout and ambushed the escapees to eliminate an important faction of the Black Panther Party.

During *voir dire*, the court admonished prospective jurors to reveal their associations, if any, with crimes of violence and their attitudes toward radical groups, including the Black Panthers. Patricia Fagan, who became a juror, testified at *voir dire* that she had no personal knowledge of violent crimes—as a witness, victim, or otherwise—and that she did not associate the Black Panther Party with any form of violence. However, in the course of the 17-month-long trial, evidence was introduced of a crime, unrelated to those at issue in respondent's trial, of which juror Fagan had some knowledge. A defense witness identified a Black Panther named Pratt as a police informant involved in the alleged police plot. The prosecution sought to impeach this witness by introducing evidence that Pratt was in custody for the 1968 murder of a Santa Monica woman during the entire period at issue. This evidence triggered juror Fagan's recollection of the murder of a childhood friend, who was the woman Pratt had been convicted of killing.

Upon hearing the evidence about Pratt, juror Fagan twice went to the trial judge's chambers to tell him of her personal acquaintance with Pratt's 1968 murder victim. She told him that she feared that she might cry if the 1968 murder were explored further at trial. The judge asked her on each occasion whether her disposition of the case would be affected. She assured him that it would not. The judge told her not to be concerned and that the matter probably would not be mentioned again. He made no record of either conversation, and he did not inform the defendants or their counsel about them.

At the close of trial, the jury found respondent guilty of two counts of murder and of conspiracy to escape, and acquitted him of the remaining charges. The jury also convicted two other defendants of assault, and found insufficient evidence to support the numerous remaining charges. Respondent was sentenced to life imprisonment.

Counsel for respondent subsequently learned of the *ex parte* communications between judge and juror and moved for a new trial. At a hearing on the motion, juror Fagan testified that she had not remembered her friend's death during *voir dire* and that her subsequent recollection did not affect her ability impartially to judge respondent's innocence or guilt. She admitted telling other jurors that she personally knew Pratt's 1968 murder victim, but denied making any disparaging remarks about the Black Panther Party. The trial judge concluded that the *ex parte* communications "lacked any significance" and that respondent suffered no prejudice therefrom. See App. C to Pet. for Cert. 22. Accordingly, he denied the motion for new trial.

The California Court of Appeal affirmed the conviction. It found the *ex parte* communication to be federal constitutional error that was harmless "beyond a reasonable doubt" because the jury's deliberations, as a whole, were unbiased. *Id.*, at 28–35. The California Supreme Court denied review.

Respondent then petitioned for a writ of habeas corpus in Federal District Court. The District Court issued the writ, ruling that the *ex parte* communications between judge and juror violated both respondent's right to be present during all critical stages of the proceedings and his right to be represented by counsel. 543 F. Supp. 757 (ND Cal. 1982). Furthermore, the District Court held that automatic reversal was necessary because the absence of a contemporaneous record made intelligent application of the harmless-error standard impossible. Alternatively, it concluded that a post-trial hearing could not establish that the constitutional error was harmless beyond a reasonable doubt. Thus, it found that respondent's conviction had to be vacated because of the state court's failure to hold a contemporaneous hearing about, or to make a contemporaneous record of, the *ex parte* communication. The Court of Appeals for the Ninth Circuit affirmed on the basis that an unrecorded *ex parte* communication between trial judge and juror can never be harmless error.[1] Judgment order reported at 701 F. 2d 186 (1983).

We emphatically disagree. Our cases recognize that the right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant.[2] "At the same time and without detracting from the fundamental importance of [these rights], we have implicitly recognized the necessity for preserving society's interest in the administration of criminal justice. Cases involving [such constitutional] deprivations are [therefore] subject to the general rule that remedies should be tailored to the injury suffered . . . and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U. S. 361, 364 (1981); see also *Rogers* v. *United States*, 422 U. S. 35, 38–40 (1975). In this spirit, we have previously noted that the Constitution "does not require a new trial every time a juror has been placed in a potentially compromising situation . . . [because] it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Smith* v. *Phillips*, 455 U. S. 209, 217 (1982). There is scarcely a lengthy trial in which one or more jurors do not have occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial. The lower federal

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[1] Respondent also argued that his due process right to be presumed innocent was violated when he was forced to stand trial shackled and chained. Neither the District Court nor the Court of Appeals reached this issue. Given our disposition of the case, this issue only remains to be resolved on remand.

[2] Petitioners have apparently conceded, in both federal and state court, that the undisclosed *ex parte* communications established federal constitutional error. See Pet. for Cert. 29–31. We acknowledge that the trial

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judge promptly should have notified counsel for all parties after the juror approached him. Whether the error was of constitutional dimension in this case is not before us. Because we find that no actual prejudice was shown, we assume, without deciding, that respondent's constitutional rights to presence and counsel were implicated in the circumstances of this case.

JUSTICE STEVENS suggests that the only constitutional right implicated in this case is a possible due process right to a midtrial hearing on the subject of the juror's impartiality. See *post*, at 126 (STEVENS, J., concurring in judgment). Had the State raised the underlying constitutional right as an issue in the courts below and in the petition for certiorari, this approach might merit consideration. But the case came to us alleging harmless violations of the right to be present during all critical stages of the proceedings and the right to be represented by counsel, and we therefore analyze only that challenge. These rights, as with most constitutional rights, are subject to harmless-error analysis, see, *e. g.*, *United States* v. *Morrison*, 449 U. S. 361, 364–365 (1981) (right to counsel); *Snyder* v. *Massachusetts*, 291 U. S. 97, 114–118 (1934) (right to presence), unless the deprivation, by its very nature, cannot be harmless. See, *e. g.*, *Gideon* v. *Wainright*, 372 U. S. 335 (1963).

courts' conclusion that an unrecorded *ex parte* communication between trial judge and juror can never be harmless error ignores these day-to-day realities of courtroom life and undermines society's interest in the administration of criminal justice.[3]

This is not to say that *ex parte* communications between judge and juror are never of serious concern or that a federal court on habeas may never overturn a conviction for prejudice resulting from such communications. When an *ex parte* communication relates to some aspect of the trial, the trial judge generally should disclose the communication to counsel for all parties.[4] The prejudicial effect of a failure to do so, however, can normally be determined by a post-trial hearing. The adequacy of any remedy is determined solely by its ability to mitigate constitutional error, if any, that has occurred. See, *e. g., United States* v. *Morrison, supra,* at 365; *Rogers* v. *United States, supra,* at 40. Post-trial hearings are adequately tailored to this task. See, *e. g., Smith* v. *Phillips, supra,* at 218–219, and n. 8; *Remmer* v. *United States,* 347 U. S. 227, 230 (1954).

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[3] Thus, we have refused, on facts more troublesome than these, to find inherent bias in a verdict when a state trial court determined "beyond a reasonable doubt" that a juror's out-of-court action did not influence the verdict. In *Smith* v. *Phillips*, 455 U. S. 209 (1982), a criminal defendant contended that he had been denied due process because, during his state-court trial, one of the jurors applied to the prosecutor's office for a job as an investigator. The application was not brought to the parties' attention until sometime after the verdict was rendered. The state court held a post-trial hearing and, relying on the juror's own testimony, found "beyond a reasonable doubt" that the juror's action had not influenced the verdict. We concluded that, in the circumstances of that case, it would not be proper to impute bias in the verdict or to find a post-trial hearing inadequate as a remedy for the alleged due process violation. *Id.*, at 219. The facts here involve no inference of juror misconduct or third-party influence, and therefore are of far less concern than the conduct at issue in *Smith.* See *infra*, at 120–121. Thus, a post-trial hearing is adequate to discover whether respondent was prejudiced by the undisclosed communications about juror Fagan's recollection.

[4] See, *e. g.*, *Rogers* v. *United States*, 422 U. S. 35, 38–40 (1975) (although violation of Federal Rule of Criminal Procedure 43 may be harmless error, additional instructions from judge to jury, without notification to defendant or his counsel, is not); *Shields* v. *United States*, 273 U. S. 583, 588–589 (1927) (undisclosed instructions from judge to jury violate nonconstitutionally based rules of orderly trial procedure); *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76, 81 (1919) (same).

The final decision whether the alleged constitutional error was harmless is one of federal law. *Chapman* v. *California,* 386 U. S. 18, 20–21 (1967). Nevertheless, the factual findings arising out of the state courts' post-trial hearings are entitled to a presumption of correctness. See 28 U. S. C. § 2254(d); *Sumner* v. *Mata,* 449 U. S. 539 (1981). The substance of the *ex parte* communications and their effect on juror impartiality are questions of historical fact entitled to this presumption. Thus, they must be determined, in the first instance, by state courts and deferred to, in the absence of "convincing evidence" to the contrary, by the federal courts. See *Marshall* v. *Lonberger,* 459 U. S. 422, 431–432 (1983). Here, both the State's trial and appellate courts concluded that the jury's deliberations, as a whole, were not biased. This finding of "fact"—on a question the state courts were in a far better position than the federal courts to answer—deserves a "high measure of deference," *Sumner* v. *Mata,* 455 U. S. 591, 598 (1982), and may be set aside only if it "lack[s] even 'fair support' in the record." *Marshall* v. *Lonberger,* 459 U. S., at 432. The absence of a contemporaneous recording will rarely deprive the finding of "even 'fai[r] suppor[t]' in the record." See *ibid.*

The post-trial hearing in this case created more than adequate support for the conclusion that juror Fagan's presence on the jury did not prejudice respondent. The 1968 murder was not related to the crimes at issue in the trial. Pratt was not connected to any of the offenses for which respondent was convicted, and he did not testify at the trial. Juror Fagan never willfully concealed her association with the Santa Monica crime, and she repeatedly testified that, upon recollection, the incident did not affect her impartiality.[5] She turned to the most natural source of information—the trial judge—to disclose the information she should have recalled but failed to recall during *voir dire*. Their *ex parte* communication was innocuous. They did not discuss any fact in controversy or any law applicable to the case. The judge simply assured her that there was no cause for concern. Thus, the state courts had convincing evidence that the jury's deliberations, as a whole, were not biased by the undisclosed communication of juror Fagan's recollection. The lower federal courts should have deferred to this presumptively correct state-court finding and therefore should have found the alleged constitutional error harmless beyond a reasonable doubt.[6]

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[5] A juror may testify concerning any mental bias in matters unrelated to the specific issues that the juror was called upon to decide and whether extraneous prejudicial information was improperly brought to the juror's attention. See Fed. Rule Evid. 606(b); *Smith* v. *Phillips*, *supra*, at 217, and n. 7, 218–219, and n. 8. But a juror generally cannot testify about the mental process by which the verdict was arrived. See *Mattox* v. *United States*, 146 U. S. 140 (1892). Thus, the California Court of Appeal refused to consider certain testimony in arriving at its decision that respondent had not suffered prejudice "beyond a reasonable doubt." App. C to Pet. for Cert. 33. The District Court improperly refused to defer to the California Court of Appeal's sensitive review of this evidence. See 543 F. Supp. 757, 773–774 (ND Cal. 1982).

[6] Although JUSTICE MARSHALL's dissent purportedly agrees that the District Court was obliged to defer to the California Court of Appeal's finding that the jury's deliberations were not biased if that finding had "even 'fair support' in the record," *post*, at 143, its critique of the circumstances underlying that finding proves otherwise. The dissent concedes, albeit grudgingly, that each circumstance the California Court of Appeal relied on in concluding "beyond a reasonable doubt" that the jury's impartiality was not impaired was probative. See *post*, at 143–148. But the dissent, like the District Court below, argues that each circumstance is defective either because it depends on the juror's own statements concerning her impartiality or because "the potential for impairment of the jury's impartiality [in each] was considerable." See *post*, at 148. Thus, the dissent, like the District Court, bases its conclusion not on a "lack of even fair sup-

Accordingly, we grant the motion of respondent for leave to proceed *in forma pauperis* and the petition for certiorari, vacate the judgment of the Court of Appeals, and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN dissents from this summary disposition. He would grant the petition for certiorari and set the case for oral argument.

JUSTICE STEVENS, concurring in the judgment.

Respondent was convicted of several serious offenses in a state trial during which the trial judge learned of a basis for challenging the impartiality of a juror from *ex parte*, unrecorded conversations with the juror; the judge did not *sua sponte* inform the parties of the occurrence or the substance of the conversations. Respondent contended, and the courts below held, that he was thereby deprived of liberty without due process of law and entitled to a writ of habeas corpus. Assuming that the respondent was deprived of his right to be present during a critical stage of his trial and his right to

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port in the record" but on its own evaluation of the credibility of the witnesses, see, *e. g.*, *post*, at 145, n. 29, and a concern about the potential for prejudice in the underlying circumstances.

Such an approach plainly fails to adhere to the commands of the applicable statute. Title 28 U. S. C. § 2254(d) provides that the state courts' determinations about witness credibility and inferences to be drawn from the testimony were binding on the District Court and are binding on us. See *Marshall* v. *Lonberger*, 459 U. S. 422, 434 (1983). Title 28 U. S. C. § 2254(d) requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations. It must conclude that the findings "lac[k] even 'fair support' in the record." 459 U. S., at 432. That statutory test is satisfied by the existence of probative evidence underlying the California Court of Appeal's conclusion that the jury's impartiality was unimpaired "beyond a reasonable doubt." *Ibid.* Thus, our holding necessarily follows from the state courts' findings of fact and from the presumption of correctness accorded to those findings.

effective assistance of counsel, the Court vacates on the ground that the state court's conclusion that the juror was impartial has fair support in the record and hence the constitutional deprivations were harmless beyond a reasonable doubt.

Most of my colleagues "emphatically disagree"[1] with the suggestion that a simple test can be used to determine whether an *ex parte* communication between a trial judge and a juror makes a subsequent jury verdict constitutionally infirm. Nevertheless, I believe both the majority and the dissents gloss over the serious legal issues presented by this case.

The majority concludes that the lower federal courts had a duty to find the alleged constitutional error harmless beyond a doubt because of the state-court conclusion that the jury was impartial. *Ante*, at 121. JUSTICE MARSHALL has persuasively shown, however, that there is a reasonable doubt concerning juror Fagan's impartiality. That doubt forecloses reliance on the harmless error standard enunciated in *Chapman* v. *California*, 386 U. S. 18 (1967),[2] but that doubt does not require that this petition for a writ of habeas corpus be granted.

In order to evaluate the significance of an alleged constitutional deprivation, it is essential that it first be correctly identified.[3] The alleged deprivation in this case has been characterized in three ways: (1) a denial of the defendant's right to be present at every critical stage of a criminal trial, (2) a denial of the right to effective assistance of counsel at trial, (3) a denial of the right to be tried by an impartial jury.[4]

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[1] Compare:

"The Court of Appeals for the Ninth Circuit affirmed on the basis that an unrecorded *ex parte* communication between trial judge and juror can never be harmless error.

"We emphatically disagree." *Ante*, at 117 (footnote omitted).

with:

"To the extent that the majority means to imply that judges and jurors may freely engage in *ex parte* discussions of 'aspect[s] of the trial,' I emphatically disagree." *Post*, at 139, n. 19.

[2] As the Court has often stated, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U. S., at 24.

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[3] As I have previously explained, claims of constitutional error are not fungible.

"There are at least four types. The most frequently encountered is a claim that attaches a constitutional label to a set of facts that does not disclose a violation of any constitutional right. . . . The second class includes constitutional violations that are not of sufficient import in a particular case to justify reversal even on direct appeal, when the evidence is still fresh and a fair retrial could be promptly conducted. *Chapman* v. *California*, 386 U. S. 18, 22; *Harrington* v. *California*, 395 U. S. 250, 254. A third category includes errors that are important enough to require reversal on direct appeal but do not reveal the kind of fundamental unfairness to the accused that will support a collateral attack on a final judgment. See, *e. g.*, *Stone* v. *Powell*, 428 U. S. 465. The fourth category includes those errors that are so fundamental that they infect the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained." *Rose* v. *Lundy*, 455 U. S. 509, 543–544 (1982) (STEVENS, J., dissenting).

In order to obtain habeas corpus relief from incarceration pursuant to a presumptively valid state-court judgment, a prisoner must persuade a federal court that the most serious kind of constitutional error infected the proceedings that led to his conviction. "It is of the historical essence of habeas corpus that it lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void." *Fay* v. *Noia*, 372 U. S. 391, 423 (1963). Moreover, "the burden of showing essential unfairness [must] be sustained by him who claims such injustice and seeks to have the result set aside, and . . . it must be sustained not as a matter of speculation but as a demonstrable reality." *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 281 (1942).

[4] The California Court of Appeal, the first court to confront respondent's claim that he had been deprived of liberty without due proces of law, stated that the issue before it arose "at the confluence of three streams of constitutional doctrine, flowing from the right of defendants in criminal proceedings to trial by an impartial jury, their right to be personally present during the proceedings, and their right to be represented by an attorney." App. C to Pet. for Cert. 22–23. Instead of analyzing the serious questions the case presents, however, the court merely assumed that "there was fed-

If respondent had established any of these deprivations, he would have sustained his burden of showing essential unfairness and would be entitled to the issuance of a writ of habeas corpus.

The question whether respondent was deprived of his right to be tried by an impartial jury is not before us, for respondent did not raise this claim in his habeas petition, choosing not to contend that juror Fagan was biased, either as a matter of law or as a matter of fact. 543 F. Supp. 757, 765 (ND Cal. 1982). The majority, however, passes on this question in concluding that the assumed deprivations of the fundamental constitutional rights to counsel and presence at trial were harmless error.

I think it quite clear that the mere occurrence of an *ex parte* conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right. The defense has no constitutional right to be present at every inter-

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eral constitutional error committed as a consequence of the *in camera* conversations between Fagan and the trial judge in that neither [respondent] nor [his] counsel were present." *Id.*, at 23. The court then proceeded to determine whether this ill-defined "constitutional error" was harmless beyond a reasonable doubt. In doing so, the court essentially ignored the constitutional deprivation it had assumed, and instead concluded that Fagan's recollection of her friend's murder at the hands of a Black Panther did not deprive respondent of his right to an impartial jury. The only role played by the "constitutional error" in the court's analysis was that it allocated the burden of proof to the State to show "beyond a reasonable doubt" that the jury was not biased. The California Court of Appeal's unfortunate mode of analyzing this case is regrettably repeated in this Court.

I understand that the Court's approach to this case is largely a function of petitioners' apparent concession below that the *ex parte* communications established a constitutional violation. An apparent concession is all that it is, however, for petitioners' concession is so amorphous as to be meaningless and the parties actually argue the substance of the constitutional questions under the harmless error label. Indeed, the District Court recognized the illusory nature of petitioners' concession: it refused to assume the existence of a constitutional deprivation without substance or content and proceeded to determine for itself whether the facts disclosed violations of constitutionally secured rights. 543 F. Supp. 757, 765 (ND Cal. 1982).

action between a judge and a juror, nor is there a constitutional right to have a court reporter transcribe every such communication. The fact that the judge learned of the potential bias of juror Fagan in an *ex parte* conversation with her is irrelevant in this case. There is no dispute concerning the content of those conversations; if the testimony about the conversations elicited at the post-trial hearing affords a basis for challenging the conviction, it affords a basis for answering those contentions as well. Moreover, to the extent that the claim of partiality is deemed to be before the Court, there is no contention that the post-trial hearing was inadequate to establish the historical facts relevant to assessing whether she was biased as a matter of law. In any event, there is of course no contention that whatever bias she harbored against the Black Panther Party and by inference against the respondent was the result of the conversations with the trial judge, nor is there any basis for suggesting that the conversations exacerbated whatever bias she harbored. Thus, the question in this case would be the same if the judge had learned of the potential bias of juror Fagan from an external source.[5]

If the trial judge's actions in this case consititute an error of constitutional dimension, it would have to be on the ground that respondent was denied his core due process right to notice and an opportunity to be heard in a meaningful manner and at a meaningful time by the trial judge's failure to notify the defense of a fact raising a question about a juror's partiality. In essence, respondent's claim is that he had a due process right to a midtrial hearing on the subject of Fagan's impartiality because of the option which existed at that point of replacing Fagan with an alternate. If such a right exists, the defendant would naturally have a right to be present at the hearing and have the assistance of counsel at the hearing, but the existence of this right would not stem from the right to be present or the right to counsel. To argue that the right to counsel and presence is the source of the right to the midtrial hearing is to reason backwards. Naturally since respondent was denied the opportunity for such a hearing, he was denied the incidents of such a hearing, but that does not establish a violation of the incidental rights unless there was a predicate right to notice and a midtrial hearing.

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[5] Indeed, the case would not be very different if defense counsel had learned of the potential bias in the course of the trial, and the trial judge denied a motion for a midtrial hearing on the question, but held a post-trial hearing.

While I believe that the trial judge should have promptly notified defense counsel of the substance of his conversations with juror Fagan, his error was not so fundamental as to render the conviction void. The trial judge made an error of judgment in failing to grasp the fact that Fagan's previously undisclosed knowledge would provide a basis for challenging her for cause on the grounds of imputed bias. Under the circumstances, that error was understandable, given that the nature of Fagan's expressed concerns to the judge did not explicitly raise a question of bias against any defendant and only through generalization raised a question of imputed bias against the Black Panther Party—Fagan's only concern was that she might lose her composure if the murder of her friend were explored in more detail—and that no evidence of respondent's membership in the Black Panther Party had at that point been introduced. While the good faith of the trial judge is not the question, the reasonableness of his actions under the circumstances is plainly relevant to determining whether they were so fundamentally unfair that they rendered the verdict a nullity. Moreover, respondent was provided with a full and fair opportunity to discover the information about the murder of Fagan's friend. Three months were devoted to jury selection, and while counsel's brief, general questions to juror Fagan about her "knowledge" about "crimes [of] violence" as a "witness, victim, [or] otherwise," and whether she "associate[d] the Black Panther Party with any form of violence in [her] own mind," App. C to Pet. for Cert. 16, failed to elicit her later revealed knowledge of the murder of her friend, that failure was not a consequence of any shortcoming of the mechanism the State made available for uncovering that information. Finally, the defense ultimately did discover the information, apparently because of the effective assistance of his counsel, and discovered it in time for a meaningful hearing to be held in which the substance of the *ex parte* conversations and the extent of Fagan's knowledge of potentially prejudicial information could be established. In light of these factors, I conclude that respondent failed to sustain his burden of demonstrating a deprivation of a right so essential to the integrity of the process by which his conviction was obtained that it renders void the presumptively valid judgment.[6]

By failing to analyze the real procedural due process question which this case presents, and instead casually assuming the deprivation of the right to counsel and the right to presence—the labels the parties find apt to decribe the essential question—the majority endorses the application of a harmless error analysis to actual deprivations of these rights. Some constitutional rights, however, are so basic to a fair trial that their infraction can never be treated as harmless error. In my opinion the right to the effective assistance of counsel at trial is such a right.[7]

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[6] If respondent had a fundamental due process right to notice of the substance of the communication between the judge and the juror and an opportunity for a hearing on the matter during midtrial, the reason for recognizing such a right would stem from the fact that juror bias questions are inherently speculative and that the meaningful time for a hearing on such questions is at a point in time when doubts about impartiality can be easily remedied by replacing the juror with an alternate. A deprivation of a right with such a rationale could not be held to be harmless error. See, *e. g.*, *Chapman* v. *California*, 386 U. S. 18, 52, n. 7 (1967) ("[P]articular types of error have an effect which is so devastating or inherently indeterminate that as a matter of law they cannot reasonably be found harmless") (Harlan, J., dissenting). This, in substance, is what the lower courts held.

[7] *Chapman* v. *California*, 386 U. S., at 23, and n. 8; *id.*, at 42–44 (Stewart, J., concurring in result); *id.*, at 52, and n. 7 (Harlan, J., dissenting);

The Court's reasoning in applying the harmless error analysis must be that the purpose of affording the right to counsel in the circumstances of this case would be to guard against the risk of a biased jury, and hence if the jury was impartial, the risk never materialized and the deprivations were harmless.[8] If that reasoning were generally applied, however,

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see *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *Glasser* v. *United States*, 315 U. S. 60, 76 (1942) ("The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial"); *Johnson* v. *Zerbst*, 304 U. S. 458 (1938); *Powell* v. *Alabama*, 287 U. S. 45 (1932); see also *Cuyler* v. *Sullivan*, 446 U. S. 335, 349–350 (1980); *Geders* v. *United States*, 425 U. S. 80 (1976); *Herring* v. *New York*, 422 U. S. 853, 863 (1975). The Court has permitted harmless error analysis regarding deprivations of the right to counsel at pretrial stages of criminal proceedings, *e. g.*, *Coleman* v. *Alabama*, 399 U. S. 1 (1970), but see *White* v. *Maryland*, 373 U. S. 59 (1963) *(per curiam)*, and naturally permits such analysis when the violation of the Sixth Amendment consists of the admission of evidence, since it is ordinarily possible to ascertain whether consideration of inadmissible evidence is harmless error, compare *United States* v. *Henry*, 447 U. S. 264, 274–275, n. 13 (1980), with *Massiah* v. *United States*, 377 U. S. 201 (1964); see also *Moore* v. *Illinois*, 434 U. S. 220 (1977).

In *United States* v. *Morrison*, 449 U. S. 361 (1981), we assumed that a pretrial unsuccessful attempt by Government agents to deprive a defendant of her right to effective assistance of counsel was a violation of the Sixth Amendment and held that dismissal of an indictment is not a proper remedy for that assumed violation. *Morrison* is not a harmless error case. The opinion did observe that even if the Government agents had managed to elicit incriminating information from the defendant, in violation of *Massiah* v. *United States*, *supra*, in their otherwise unsuccessful attempt to persuade her to cooperate and to discharge her attorney, her remedy for that violation would simply be to suppress the tainted evidence. The erroneous admission of such evidence would be susceptible to a harmless error analysis, as the opinion indicated when it then noted in passing that "certain" violations of the right to counsel may be disregarded as harmless error, correctly citing *Moore* v. *Illinois*, *supra*, as identifying the types of violations which may be treated as harmless error—a limited exception to our conclusion in *Chapman*. 449 U. S., at 365.

[8] Whether application of this analysis is appropriate with respect to the purported right-to-presence violation is largely a question of semantics. The right to be present at trial is rooted in the Confrontation Clause. *Illinois* v. *Allen*, 397 U. S. 337, 338 (1970). If a defendant were denied ac-

any deprivation of the right to counsel at trial, perhaps short of totally denying any assistance whatsoever, could be deemed harmless error. Fidelity to the Sixth Amendment and to precedent demands that such reasoning be rejected.

Finally, the majority concludes that Fagan's presence on the jury did not prejudice respondent, casually attaching the "beyond a reasonable doubt" label to the conclusion made obligatory by the presumed constitutional violations. I find it extraordinary that the majority is prepared to hold in essence that juror Fagan was impartial beyond a reasonable doubt.[9] The undisputed facts concerning the murder of her friend may not have rendered her biased as a matter of law—

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cess to the courtroom while the prosecutor was examining his accusers, the constitutional error would taint the verdict no matter how firmly we might be convinced that the defendant's absence did not affect the outcome of the trial. See *Snyder* v. *Massachusetts*, 291 U. S. 97, 116 (1934) ("[C]onstitutional privileges or immunities may be conferred so explicitly as to leave no room for an inquiry whether prejudice to a defendant has been wrought through their denial"). Even so, a very brief absence might be held to be a *de minimis* violation and afford no basis for relief. *Ibid.* Moreover, we have viewed a potential for prejudice as a necessary element of a violation of the right to be present. Thus, while a core Confrontation Clause violation might not be deemed harmless error, the more general right to presence may be inherently susceptible to a harmless error analysis. *Id.*, at 114–118.

[9] The majority uses the phrase the jury's deliberations "as a whole" were not biased. *Ante*, at 120, 121. Unless one can say beyond a reasonable doubt that juror Fagan's deliberations were not improperly influenced by her knowledge of the murder of her friend at the hands of a Black Panther, I fail to see how one can conclude that the jury's deliberations "as a whole" were not biased. Hence, I fail to see the point in not focusing on Fagan in this analysis. Respondent has never made any serious effort at establishing that the other jurors' knowledge of the murder of Fagan's friend directly influenced their thoughts about the case. I cannot believe that the majority means to imply that an additional showing of prejudice is required after one of the jurors is established to be prejudiced. Surely, a defendant has a right to impartiality on the part of all of the jurors, and a violation of that right is plainly not susceptible to a harmless error analysis. See *Tumey* v. *Ohio*, 273 U. S. 510 (1927).

a question which we need not decide—but they surely establish a reasonable doubt concerning her impartiality, and the presumptively correct findings of the state courts that she was not biased as a matter of fact erase neither the doubt nor the reasonableness of it.

In summary, although I agree that respondent has not carried his burden of establishing that his trial was fundamentally unfair, I cannot subscribe to the Court's assumption that a violation of the right to the assistance of counsel at trial, if established by the record, could be characterized as harmless beyond a reasonable doubt. Nor can I subscribe to the Court's analysis of the harmless error conundrum of its own making. I therefore concur in the judgment but do not join the Court's opinion.

JUSTICE MARSHALL, dissenting.

Without the benefit of briefing or oral argument, the Court today vacates the judgment of the Court of Appeals for the Ninth Circuit, affirming the decision of the District Court to issue a writ of habeas corpus. Because I believe that the rulings below were correct, and because I believe that important constitutional questions deserve more careful consideration than they have been accorded in this case, I dissent.

I

In 1971, George Jackson, a leader of the Black Panther Party, along with several other prisoners attempted to escape from San Quentin Prison. The plot was detected, and, in the course of the ensuing melee, Jackson, two other prisoners and three prison guards were killed. Respondent and five codefendants, all of whom allegedly were involved in the plan, were tried in a California court on charges of murder, conspiracy, and assault. One of the principal disputed issues in the case was the degree to which Jackson and the defendants had been assisted by members of the Black Panther Party "on the outside" in planning and executing the escape attempt. In an effort to assemble a jury capable of assessing impartially this and other controversial questions, the trial judge and defense counsel during *voir dire* questioned prospective jurors regarding their attitudes toward the Black Panthers and toward violent crimes in general. One of the members of the venire, Patricia Fagan, testified that she did not associate the Black Panthers with violence and that she did not have any personal knowledge of violent crime; Fagan was subsequently accepted as a juror.

After 13 months of trial, the defense called as a witness one Louis Tackwood, who testified that various law enforcement officers had plotted to encourage Jackson to escape. Allegedly, the police hoped to induce a group of Black Panthers to try to rescue Jackson, whereupon the police would ambush and kill the conspirators. Tackwood testified that Elmer "Geronimo" Pratt was to be the leader of the rescue group, but that Pratt was also acting as a police informant. In an effort to impeach Tackwood's testimony, the prosecution introduced evidence that, during the time in question, Pratt was incarcerated for a 1968 murder. Upon hearing this testimony, juror Fagan remembered that Carolyn Olson, one of her childhood friends,[1] had been brutally murdered by members of the Black Panther Party.[2] Fagan feared that the 1968 murder that had just been discussed by the prosecutor was that of her friend.

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[1] Fagan's subsequent descriptions of the intimacy of her relationship with Olson varied somewhat. The California Court of Appeal resolved those discrepancies as follows: "Patricia Fagan had from the age of six or seven been a 'good,' 'close,' but not 'best' friend of Carolyn Olson. . . . Fagan cared for Olson's daughter on a daily basis while Olson was attending U. C. L. A. in about 1962. At this time, the two women rarely visited socially. Fagan knew Olson's husband." *People* v. *Spain*, No. 1/Crim. 16126 (Cal. App. July 24, 1980), reprinted in App. C to Pet. for Cert. 14–15 (hereafter App. C). In the absence of "convincing evidence" to the contrary, the foregoing findings—as well as all other findings by the state trial court and state appellate court that pertain to matters of historical fact—were binding on the District Court and are binding on us. *Marshall* v. *Lonberger*, 459 U. S. 422, 432–435 (1983); *Sumner* v. *Mata*, 455 U. S. 591, 592–593 (1982) *(per curiam)*.

Fagan went to the trial judge's chambers and informed him of her suspicions. She told the judge that she might cry if Pratt's prior crime were mentioned again in the courtroom. The judge indicated that it was unlikely that Pratt was her friend's murderer. The judge asked Fagan whether her deliberations would be affected by what she had learned, and that Fagan indicated that they would not.[3] The judge then admonished her to put the matter out of her mind.

That evening, Fagan called her mother and ascertained that Pratt was indeed the person who had been convicted of killing Carolyn Olson. The next morning, Fagan again went to the trial judge's chambers: told him of her findings, and reiterated her fear that she would break down if the 1968 murder were discussed in court. As the judge later described their ensuing conversation: "I told her I didn't see how that was significant, but did she feel it would have any effect on her disposition towards the case. She said that she did not accept that, she felt that if Mr. Pratt were called to testify, that she would be very unsettled by that."[4] As Fagan subsequently recollected the meeting, the judge then assured her that the lawyers probably would not delve further into the matter of Pratt's prior crime, to which she responded "something to the effect, 'O.K., no problem, then,' meaning that the information regarding Pratt and my friend would have no adverse effect on me, and played no part in my evaluation of this case."[5]

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[2] "The circumstances of the killing, as known to [Fagan], were that Olson and her husband were playing tennis when two people demanded their money, ordered them to lie down, and shot them." *People* v. *Spain*, App. C, at 15; see also Tr. of Postconviction Hearing 23958 (Tr.).

[3] Neither the judge's preliminary account of this first meeting, nor Fagan's first postconviction description of the encounter indicated that Fagan's ability to remain impartial had been discussed. In their subsequent accounts, however, both parties maintained that the judge had questioned Fagan on this point and Fagan had indicated that her deliberations would be unaffected. The state appellate court credited Fagan's and the judge's later testimony, see *People* v. *Spain*, App. C, at 19–20, and the District Court was bound by the state court's assessment of the conflicting evidence, see n. 1, *supra*.

[4] Tr. 23920.

The judge made no record of either of his conversations with Fagan and did not inform respondent, defense counsel, or the prosecutor of what Fagan had told him. Sometime later, Fagan "mention[ed] to other jurors that Pratt [had been] convicted of the murder of a friend," but, "to the best of [her] recollection," the subject was never again discussed among the jurors.[6]

Three aspects of the subsequent development of the trial are germane to the matters discussed by Fagan and the judge. First, on the Monday following the two *ex parte* meetings, a witness identified Pratt as "the leader of the Panthers in Los Angeles." Second, only after the meetings in question did the defense introduce evidence of respondent's membership in the Black Panther Party. Leaders of the party were called as witnesses, one of whom testified as to her association with respondent. Finally, in his closing argument, the prosecutor argued that "the Black Panther Party had helped to smuggle weapons or ammunition to Jackson and implied that [respondent's] party membership was evidence that he, too, was 'involved in' the escape plan and 'working with' Jackson."[7]

After 24 days of deliberation, the jury acquitted three of the six defendants on all counts. Two of the remaining defendants were convicted of assault. Respondent, the only defendant who was a member of the Black Panther Party, was convicted of two counts of murder and of conspiracy to escape.[8] Respondent was sentenced to life imprisonment.

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[5] Affidavit of Patricia Fagan, Sept. 27, 1976, District Court Record 5481–5482 (R.); see also *People* v. *Spain*, App. C, at 19–20.

[6] R. 5482; see also *People* v. *Spain*, App. C, at 21.

[7] *Id.*, at 10.

After the trial, respondent's counsel was told by a third party about Fagan's *ex parte* contacts with the trial judge. Respondent's counsel went to Fagan's home and interviewed her regarding the nature of her discussions with the judge. On the basis of what he learned from that conversation, respondent's counsel moved for a new trial. The judge conducted a hearing on respondent's motion. After giving his own account of the two meetings and discussing the incidents with counsel, the judge called Fagan as a witness. At the outset of the examination of Fagan, the judge told her that "it has been suggested that there is a potential that your testimony may disclose a violation of your oath of office as a juror in the case, and if that were to be true, you would potentially face possible criminal prosecution arising out of that."[9] The judge informed Fagan that she had a right not to incriminate herself and a right to have a lawyer present to advise her during questioning.[10] Fagan then formally waived her right to an attorney,[11] and the hearing proceeded.

In the course of the examination, respondent's attorney at several points asked Fagan questions that related to the effect upon her deliberations in the case of her knowledge that her childhood friend had been murdered by a member of the Black Panther Party. At each point, the prosecutor successfully objected to the question on the ground that inquiry into the mental processes by which a juror reached a verdict is proscribed by Cal. Evid. Code Ann. § 1150(a) (West 1966).[12] Fagan's testimony accordingly was limited to an account of what occurred in her meetings with the judge and to what she had known, believed, or felt at various points in the trial.[13] None of the other jurors testified at the hearing.

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[8] Respondent's conviction on the two counts of murder was based upon a theory of vicarious liability. It was not alleged that respondent himself killed anyone; rather, the prosecution argued that respondent had joined a conspiracy between Jackson and one Bingham to escape and that the murders were probable consequences of that conspiracy. All of respondent's convictions thus turned upon the strength of his association with Jackson, and it was that association that the prosecutor sought to establish by stressing respondent's and Jackson's common membership in the Black Panther Party.

[9] Tr. 23944.

[10] *Id.*, at 23944–23945.

[11] *Id.*, at 23945.

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[12] Section 1150(a) provides:

"Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

The distinction drawn by the California rules between evidence of facts bearing upon the existence of any extraneous influence on the jury's deliberations and evidence of the mental processes by which the jury reached a result is consistent with that drawn in most other jurisdictions. See, *e. g.*, *Mattox* v. *United States*, 146 U. S. 140, 149 (1892).

[13] The majority states that, at the postconviction hearing, "Fagan testified that . . . her subsequent recollection [of her friend's death] did not affect her ability impartially to judge respondent's innocence or guilt." *Ante*, at 116. Later, the majority makes much of the fact that Fagan "repeatedly testified that, upon recollection, the incident did not affect her impartiality." *Ante*, at 120–121. No such testimony can be found in the transcript of the postconviction hearing. The prosecutor and trial judge took care to prevent Fagan from answering any questions that pertained to the reasoning or motivations that induced her to conclude that respondent was guilty. See, *e. g.*, Tr. 23965–23971. Indeed, Fagan did not even testify as to what she had told the judge during their *ex parte* meetings concerning the effect of her recollection upon her disposition toward the case. The only testimony at the hearing that pertained to their discussion of her impartiality was provided by the trial judge. His account of their conversations indicated (at most) that Fagan had assured him that she *would* remain impartial when it came time to render a verdict. See *id.*, at 23919–23920. The judge's description of what Fagan said during the meetings is corroborated by the affidavit that Fagan submitted to the trial

On the basis of Fagan's testimony and of his own recollection of the events at issue, the trial judge ruled that respondent had failed to demonstrate that he was prejudiced by the *ex parte* contacts[14] and accordingly denied respondent's motion for a new trial. The California Court of Appeal, in a divided opinion, affirmed on the ground that, although the secret contacts between Fagan and the trial judge gave rise to federal constitutional error,[15] the error was harmless. The California Supreme Court denied review.

Respondent then petitioned the District Court for a writ of habeas corpus. 543 F. Supp. 757 (ND Cal. 1982). On the basis of a thorough and thoughtful analysis of the questions presented, the court issued the writ. The District Court agreed with the California appellate court that respondent's constitutional rights to be present at critical stages of his trial and to be represented by counsel were violated by the conduct of the trial judge. The District Court then ruled, in the alternative, that the judge's failure to make any record of his conversations with Fagan precluded application of the harmless-error standard of review and that the State had failed to establish that the error in question was harmless beyond a reasonable doubt.[16] In a brief memorandum opinion, the Court of Appeals for the Ninth Circuit affirmed. Judg-

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court, see *supra*, at 133–134, and n. 5. But nothing in the record indicates whether Fagan was able to keep her promise that she would remain unbiased.

[14] The District Court accurately characterized the state trial judge's finding as an "implicit" conclusion that any error was harmless. See 543 F. Supp. 757, 771 (ND Cal. 1982), affirmance order, 701 F. 2d 186 (CA9 1983).

[15] The Court of Appeal's opinion is somewhat ambiguous on this issue. At one point the court suggested that it was simply assuming for the sake of argument that respondent had demonstrated federal constitutional error. See *People* v. *Spain*, App. C, at 23. At other points, the court seemed to vouch for the proposition that constitutional error had been shown. See *id.*, at 23, n. 4, and 26–27. In any event, the District Court was obliged to determine this issue *de novo*.

[16] 543 F. Supp., at 768–777.

ment order reported at 701 F. 2d 186 (1983). The court reasoned that "[i]n this case the district court correctly concluded that the condition of the record made it impossible to apply intelligently the harmless error test."[17]

II

The California Court of Appeal aptly observed that the issue in this case "arises at the confluence of three streams of constitutional doctrine, flowing from the right of defendants in criminal proceedings to trial by an impartial jury, their right to be personally present during the proceedings, and their right to be represented by an attorney."[18]

The existence and importance of the three constitutional rights mentioned by the Court of Appeal are beyond dispute. "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin* v. *Dowd*, 366 U. S. 717, 722 (1961); see also *Turner* v. *Louisiana*, 379 U. S. 466, 471–473 (1965). "It is now accepted . . . that an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings, *Snyder* v. *Massachusetts*, 291 U. S. 97 [1934]." *Faretta* v. *California*, 422 U. S. 806, 819, n. 15 (1975). "The Sixth Amendment provides that an accused shall enjoy the right 'to have the Assistance of Counsel for his defense.' This right, fundamental to our system of justice, is meant to assure fairness in the adversary criminal process. Our cases have accordingly been responsive to proved claims that governmental conduct has rendered counsel's assistance to the defendant ineffective." *United States* v. *Morrison*, 449 U. S. 361, 364 (1981) (citations omitted); see also *Herring* v. *New York*, 422 U. S. 853, 857 (1975) (acknowledging the applicability of these principles to state criminal proceedings).

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[17] *Spain* v. *Rushen*, No. 82–4358 (CA9 Jan. 24, 1983), reprinted in App. A to Pet. for Cert. 5. The majority characterizes the holding of the Court of Appeals as a ruling that "an unrecorded *ex parte* communication between trial judge and juror can never be harmless error." *Ante*, at 117. Though the Court of Appeals' decision is not altogether clear on this point, its reference to "this case" strongly suggests that it intended to rule only that, on the facts of the controversy before it, the potential for harm to respondent entailed by the secret meetings between Fagan and the trial judge was so great that something more than a postconviction hearing five months after the incidents in question was necessary to establish that the constitutional error was harmless. If the majority is truly concerned lest the Court of Appeals' memorandum opinion be read more broadly, the proper disposition of the case would be to remand it with instructions to the Court of Appeals to clarify the basis of its decision, not summarily to vacate the decision on the ground that "[t]he lower federal courts should have . . . found the alleged constitutional error harmless beyond a reasonable doubt." *Ante*, at 121.

[18] *People* v. *Spain*, App. C, at 22–23.

What links these three doctrines in the instant case is that the adversary process ceases to work effectively when neither the defendant nor his attorney is informed of an event that may significantly affect the ability of a member of the jury impartially to weigh the evidence presented to him.[19] Deprived of such information, the defendant and his counsel are unable to take measures either to ascertain whether the juror is indeed prejudiced (and, if so, to request his replacement by an alternate) or to organize the presentation of their case so as to offset or mitigate the juror's potential bias. It matters little whether one characterizes the resultant injury to the defendant as a deprivation of the right to counsel, a violation of the "right to be present," or an abridgment of the right to an impartial jury. The essence of the situation is that, when information that bears upon the ability of a juror to remain "indifferent" is withheld from the defendant and his counsel, the machine on which we rely to ensure that the defendant is not deprived of his liberty without due process of law breaks down.

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[19] The majority relies upon an assumption that "[t]here is scarcely a lengthy trial in which one or more jurors do not have occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial." *Ante*, at 118. Whatever one thinks of the accuracy of the majority's generalization regarding the frequency of contacts between judges and jurors, it has little to do with this case. At issue here is a pair of *ex parte* meetings between a trial judge and a juror in which the juror revealed to the judge facts that impinged significantly upon the juror's impartiality—*i. e.*, that bore upon the juror's ability fairly to assess the defendant's guilt or innocence. The question whether the judge had a constitutional obligation to tell the defendant or his lawyer what the juror had told him should not depend upon how often jurors approach judges to talk about matters of "personal comfort." To the extent that the majority means to imply that judges and jurors may freely engage in *ex parte* discussions of "aspect[s] of the trial," I emphatically disagree.

It is undeniable that the information withheld from respondent bore significantly upon the ability of at least one juror to remain impartial. In her meetings with the trial judge, Fagan acknowledged that, in midtrial, she had remembered that a childhood friend had been murdered by a leader of an organization to which respondent belonged and other members of which were alleged to have conspired to commit the crime for which respondent was accused. Fagan further admitted that her recollection of her friend's murder was sufficiently poignant that she was liable to break down if the event were mentioned again in the courtroom. The potential impact upon Fagan's impartiality of her recently revived memories was enormous.[20] Preservation of the procedural protections inherent in the adversary system made it essential that respondent or his lawyer be informed of the circumstances that had come to the judge's attention. The judge's failure to so inform respondent or his counsel was constitutional error.

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[20] The severity of the risk that Fagan would be unable impartially to assess the evidence presented to her—a risk that should have been apparent to the trial judge even at midtrial—distinguishes this case from *Smith* v. *Phillips*, 455 U. S. 209 (1982). Contrary to the suggestion of the majority, *ante*, at 119, n. 3, the facts of this case are significantly more "troublesome" than those of *Smith*. In *Smith*, the defendant and his counsel learned at *voir dire* that the juror in question hoped to pursue a career in law enforcement; defense counsel was nevertheless able to satisfy himself that the juror was unbiased and should be seated. At no point did the juror act in a way suggesting that his emotional outlook on the case was different from the outlook with which he began. Moreover, there was no direct link in *Smith* between the nature of the bias to which the juror was vulnerable and the substance of the contested issues in the case. By contrast, in the instant case, Fagan's revived memories were flatly inconsistent with her testimony at *voir dire*, Fagan clearly indicated to the judge the degree to which she was "unsettled" by her recollections, and the na-

III

The conclusion that respondent's federal constitutional rights were violated does not dispose of this case. As all of the courts below recognized, respondent is not entitled to relief if it can be determined beyond a reasonable doubt that respondent suffered no harm as a result of the abridgment of his rights. *Chapman* v. *California*, 386 U. S. 18 (1967). As the District Court pointed out, two kinds of possible injuries must be assessed in applying the harmless-error standard to the facts of this case: injury to respondent resulting from the bias of one or more jurors and injury resulting from respondent's loss of opportunity to correct, mitigate, or adjust to an alteration in the perspective of one or more jurors.

A

The first of these possible injuries was considered by the state courts. As the majority observes, the California Court of Appeal held that the prosecution had carried its burden to show, beyond a reasonable doubt, that "Fagan was not bi-

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ture of the potential prejudice to which she was exposed bore directly upon one of the principal disputed issues in the trial—namely, the existence and scope of a conspiracy among various members of the Black Panther Party inside and outside the prison to engineer Jackson's escape.

Smith is readily distinguishable on other grounds as well: In contrast to this case, the trial judge in *Smith* did not learn of the circumstances that threatened the impartiality of the juror until after the defendant had been convicted. Again in contrast to this case, the defendant and his counsel in *Smith* were not denied access to any meetings between the trial judge and a juror. Thus, two of the constitutional rights implicated in this case—the right to the assistance of counsel and the right to be present at critical stages of the trial, see *supra*, at 138–140—were not at issue in *Smith*. For an additional distinction between the two cases, see n. 23, *infra*.

ased or prejudiced."[21] The majority argues that "[t]his finding of 'fact'—on a question the state courts were in a far better position than the federal courts to answer—deserves a 'high measure of deference,' and may be set aside only if it 'lack[s] even "fair support" in the record.'" *Ante*, at 120 (citation omitted).

I assume, for the sake of argument, that the majority is correct in implying that the question whether a juror was biased is a matter of historical fact, rather than a mixed question of law and fact.[22] I therefore proceed on the assumption that, if the Court of Appeal's finding that Fagan was not biased was fairly supported by the record, the District Court was obliged to defer to that finding. *Marshall* v. *Lonberger*,

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[21] *People* v. *Spain*, App. C, at 28.

[22] There are good reasons to doubt the premise of the majority's opinion—namely, that a determination, based solely on inferences drawn from objective circumstances, that a juror was not biased is no different from any other factual determination for the purpose of applying the standard of review embodied in 28 U. S. C. § 2254(d). As the California Court of Appeal acknowledged when it phrased its finding as a ruling that, "beyond a reasonable doubt," Fagan was not prejudiced, the determination of this question is tantamount to a determination of the ultimate question whether the constitutional error was harmless, which is pre-eminently a matter of federal law, see *Chapman* v. *California*, 386 U. S. 18 (1967). If federal courts are obliged to defer to state-court findings of this order, the capacity of the federal courts through habeas proceedings to remedy deprivations of constitutional rights in state criminal trials will be substantially undercut. Sensitivity to these problems perhaps explains the majority's decision to place in quotation marks its description of a determination of jury bias as a question of "fact." *Ante*, at 120; see also *Smith* v. *Phillips*, *supra*, at 222, and n. (O'CONNOR, J., concurring) (In certain "exceptional situations," in which objective circumstances cast considerable doubt on the impartiality of a juror, the federal courts may be obliged to apply a doctrine of "implied bias" and, in so doing, "need not be deterred by 28 U. S. C. § 2254(d)").

The status under § 2254(d) of a state court's ruling regarding a juror's impartiality is precisely the kind of complex and important federal question that merits plenary consideration by this Court. Insofar as that question is critical to the outcome of this case, it is irresponsible in my view for the majority to attempt to resolve the issue without even the benefit of briefing by the parties.

459 U. S. 422, 432–435 (1983). However, for the reasons outlined by the District Court, it is clear that the state court's finding on this crucial issue does not have "even 'fair support' in the record."[23]

The California Court of Appeal expressly relied on three circumstances in concluding "beyond a reasonable doubt" that Fagan's impartiality was unimpaired. None can withstand scrutiny.

First. The Court of Appeal emphasized that "Pratt figures, at most, tangentially in the case."[24] It is true that the testimony at trial pertaining to Pratt had little bearing on the question of respondent's guilt or innocence. But Pratt's participation in the escape attempt is not what is at stake in this appeal. The significance of the testimony pertaining to Pratt is that it triggered Fagan's memory that Carolyn Olson had been murdered by a Black Panther. The District Court accurately analyzed the potential for harm to respondent resulting from the rejuvenation of Fagan's recollection:

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[23] As the majority notes, the facts of this case bear some resemblance to those of *Smith* v. *Phillips*, and the majority relies upon the result reached in *Smith* to buttress its ruling that the District Court in the instant case should not have issued the writ of habeas corpus. *Ante*, at 118–119, and n. 3. I remain persuaded that the decision in *Smith* was incorrect. See *Smith* v. *Phillips*, 455 U. S., at 224 (MARSHALL, J., dissenting). It should be emphasized, however, that for two reasons *Smith* does not control this case. First, as indicated above, the potential impact in this case of events occurring in midtrial upon the impartiality of the jury is substantially greater than was true in *Smith*. See n. 20, *supra*. Second, the posture in which the question of jury bias arose in *Smith* is fundamentally different from the posture in which that issue is presented in this case. In *Smith*, the existence of a constitutional violation turned upon proof of actual impairment of the impartiality of the jury. The Court ruled that only if the defendant were able affirmatively to prove bias on the part of a juror could he establish a violation of due process. Concluding that the state court's determination that the defendant had not proved bias was supported by the record and therefore was not vulnerable to review by the District Court, the majority in *Smith* held that no "constitutional violation" had been established and that the writ should not have issued. 455 U. S., at 221. In this case, by contrast, a constitutional violation occurred when the trial judge failed to inform respondent, defense counsel, or the prosecutor of what had transpired during the judge's *ex parte* meetings with Fagan. See *supra*, at 138–141. Thus, the District Court was obliged to issue the writ unless the State could prove, beyond a reasonable doubt, that respondent had suffered no injury as a result of the judge's constitutional error. The language used by the Court in *Smith* to define the burden a criminal defendant must sustain in order to prove an abridgment of his constitutional right to an impartial jury thus has no relevance to this case.

[24] *People* v. *Spain*, App. C, at 24; see also *id.*, at 35.

> "From [respondent's] perspective, the combination of Ms. Fagan's knowledge, its emotional impact on her, and the trial testimony concerning Elmer Pratt's leadership role in the Black Panther Party had potentially devastating implications. In a case concerning a violent series of events in which the Black Panther Party played a key role, . . . the defendant, though he did not know it, was being judged by a juror greatly distressed by memories of the violent death of her good friend at the hands of a person she knew to be a Black Panther Party member—a person shown by trial testimony to be a leader of that party. Extraordinary insight is not required to perceive the potential harm to [respondent] if Ms. Fagan's personal experience, rather than the evidence at trial, were permitted to determine jurors' assessments of [respondent's] guilt or innocence."[25]

For the reasons indicated by the District Court, the fact that Pratt himself did not figure prominently in the case provided no support for the state court's finding of "no bias."

Second. The Court of Appeal next pointed to "Fagan's disclaimers as to any effect that Pratt's murder of her friend might have on her consideration of the case."[26] In substantiating this reference, the Court of Appeal adverted to Fagan's testimony at three stages of the trial. First, "[a]t the voir dire, Fagan testified that she did not associate the Black Panther Party with 'any form of violence.'"[27] Such testimony is clearly irrelevant to whether Fagan's recollection of the fact that Olson was killed by a Black Panther—a recollection inconsistent with her statement at *voir dire*—affected her impartiality.

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[25] 543 F. Supp., at 773.

[26] *People* v. *Spain*, App. C, at 35.

Next, the Court of Appeal noted that, "[d]uring her conversation with the trial judge regarding Pratt, the court asked her if the Pratt killing of her friend would affect her disposition toward the case and she replied that it would not."[28] As the District Court recognized, there are compelling reasons to discount the probative value of Fagan's representations to the trial judge concerning her ability to remain impartial. Most importantly, her statements consist only of promises that, when it came time to deliberate on the case, she would not be affected by her recollection.[29] Those promises were made before Fagan was exposed to testimony that Pratt was the leader of the Black Panther Party in Los Angeles and to extensive testimony pertaining to respondent's activities as a Party member, and before the prosecutor, in his closing argument, emphasized the common membership in the Party of Jackson, respondent, and their accomplices as evidence of their joint participation in the conspiracy to escape. Finally, the record and the factual findings by the state court indicate only that Fagan, in her two meetings with the trial judge, made simple declarations (the precise content of which neither Fagan nor the judge remembers) concerning her unimpaired impartiality. The judge made no effort to test Fagan's assertions—to explore the basis for her confidence in her ability to look at the case through unjaundiced eyes. In sum, the statements made by Fagan in the two *ex parte* meetings provide little if any support for the finding of the Court of Appeal that Fagan's deliberations were unaffected by her knowledge of Olson's murder.

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[27] *Id.*, at 30–31.

[28] *Id.*, at 31–32.

[29] It is worth noting that Fagan had powerful reasons for wanting to believe that she would be able to remain impartial. Her sudden recollection of the circumstances surrounding her friend's murder occurred 13 months into the trial. Fagan was aware that her revived memory rendered untrue her responses at *voir dire* concerning her lack of personal knowledge of violence and her impression of the Black Panther Party. Most likely, she felt guilty that she had not recalled earlier the fact that Olson had been murdered by a Black Panther, and feared that the result of her lapse would be the declaration of a mistrial and the loss of 13 months of work. Under such conditions, it would have required extraordinary self-knowledge and courage for Fagan to tell the trial judge that she would not be able to examine impartially the evidence presented to her.

Finally, the Court of Appeal made some reference in its opinion to statements made by Fagan in the postconviction hearing regarding her impartiality. The court acknowledged, however, that the constraints imposed by Cal. Evid. Code Ann. § 1150(a) (West 1966) on the scope of the postconviction inquiry prevented Fagan from testifying that she had in fact remained impartial. Indeed, the Court of Appeal noted that the few statements made by Fagan that arguably bear upon her mental processes in reaching her verdict[30] "may well have been inadmissible," and the court accordingly declined to rely on them.[31] The only other relevant testimony made by Fagan in the hearing pertained to her state of mind at the time she met with the trial judge to discuss her revived recollection of her friend's murder.[32] That testimony is subject to the same infirmity as the state court's finding regarding what was in fact said at those meetings: it pertains at most to Fagan's disinterestedness at those moments and indicates nothing regarding her state of mind when it came time to render a verdict. The probative value of her statements at the hearing is further undercut by the fact that Fagan was aware that an admission that her impartiality had indeed been impaired might well subject her to criminal liability. In sum, as the Court of Appeal itself seems to have recognized, little if any support for a finding of lack of bias may be gleaned from Fagan's testimony at the postconviction hearing.

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[30] Those statements pertained to Fagan's beliefs concerning such matters as the likelihood that a person who grew up in the Watts area would "black out" when confronted with violent crime and the probability that a criminal defendant who relies upon psychiatric testimony is guilty of the crime for which he is charged. See, *e. g.*, Tr. 23966, 23968.

[31] *People* v. *Spain*, App. C, at 33.

[32] See Tr. 23957, 23977–23978. At one point in its discussion, the Court of Appeal argued that, "at the motion for a new trial where all appellants and their counsel were present, she testified that she associated the Black Panther Party with 'worthwhile activities' such as a breakfast program for school children carried on by the party." *People* v. *Spain*, App. C, at 32. The court provides no citation for this statement, and no such statement appears in the transcript of Fagan's examination at the hearing. In the

Third. The Court of Appeal noted, finally, that "[i]n addition, we rely on the objective results of the jury deliberations as demonstrating that the jury, as a whole, and Fagan, in particular, were unbiased."[33] The court reasoned that the duration of the jury deliberations indicated that "the jury carefully considered and evaluated the evidence, rather than by reason of bias or prejudice, engaged in a rush to verdict" and that the results of those deliberations—the acquittal on

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affidavit she submitted to the trial court after the verdict, Fagan did make the following remark, to which the Court of Appeal may have been referring:

"My answers to [respondent's counsel's] questions [at *voir dire*] regarding the Black Panther Party . . . were and still are true and correct. My knowledge of the Black Panther Party was primarily limited to a breakfast program for school children conducted by that organization in the Los Angeles Area. Therefore, I associate the Black Panther Party with worthwhile activities." R. 5482.

It is clear from the context that the foregoing statement pertained principally to Fagan's honesty at *voir dire* (and was designed to protect her from criminal prosecution for violation of her oath of office). At most, the statement bears only tangentially on the issue of whether Fagan's recollection of her friend's murder affected her determination that respondent had joined with other members of the Black Panther Party in plotting the escape attempt.

[33] *People* v. *Spain*, App. C, at 33.

all counts of three of the defendants, the conviction only for assault of two of the remaining defendants, and respondent's acquittal of three counts of murder and one count of assault—indicated that the jury was impartial.[34] The District Court's response to the foregoing line of argument is compelling:

> "Though the California Court of Appeal concluded that the fact that [respondent] was acquitted on some counts shows that the jury was not biased, . . . that very fact is subject to precisely the opposite inference. [Respondent] was the only defendant who was a member of the Black Panther Party and the only defendant convicted of conspiracy and murder. The only counts on which [respondent] was convicted were those with which he was connected, not by any direct participation in the acts of violence at San Quentin, but by his association and alleged conspiracy with George Jackson, also a Black Panther. All of the other defendants were acquitted of the conspiracy counts and the related substantive crimes. This pattern of convictions and acquittals, viewed from the perspective of the dangers posed by Ms. Fagan's personal exposure and reaction to events linking the Black Panther Party to other violent crime, certainly raises a reasonable possibility that the information known by Ms. Fagan and communicated to other jurors influenced the verdicts."[35]

In conclusion, none of the three circumstances relied upon by the California Court of Appeal provides significant support for its finding that the impartiality of Fagan and the other jurors was unaffected by Fagan's recollection of her friend's murder. By contrast, the potential for impairment of the jury's impartiality was considerable. The murder case against respondent was founded on a theory of vicarious liability; respondent could be found guilty only if the jury determined that he had joined an ongoing conspiracy to escape from the prison. As the Court of Appeal acknowledged, the evidence pertaining to whether there had existed such a conspiracy was closely balanced.[36] One of the facts tending to show the existence of the conspiracy was the common membership in the Black Panther Party of the alleged conspirators. The risk that, in passing on this critical question, Fagan or the other jurors whom she told of her recollection would be affected by their knowledge that Fagan's childhood friend had been murdered by a Party leader was severe. In view of the paucity of evidence of the absence of bias and the severity of the danger of bias, the District Court properly concluded that the state court's finding "beyond a reasonable doubt" that no bias existed is not fairly supported by the record.

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[34] *Id.*, at 33–35.

[35] 543 F. Supp., at 776.

B

The second injury that respondent may have suffered as a result of the constitutional error committed by the trial judge is impairment of his ability to organize the presentation of his case to take into account the sensitivities of the jury.[37] As the District Court recognized, had respondent or his counsel been told what occurred during the *ex parte* meetings, they might have acted in either of two ways (other than seeking Fagan's replacement by an alternate juror) to minimize the potential adverse impact on their case of Fagan's memory. First, they could have requested an instruction by the trial judge that Fagan not speak to the other jurors regarding the circumstances surrounding Olson's death. Second, they might have decided not to present extensive evidence of respondent's prominent role in the Black Panther Party.

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[36] *People* v. *Spain*, App. C, at 5.

[37] From this perspective, the trial judge's failure to tell defense counsel of the *ex parte* meetings with Fagan is analogous to an order by a trial judge that defense counsel may not conduct a survey of the community from which the venire is drawn to determine the prevailing attitudes of the residents to certain controversial issues that may arise during the trial. Surely such an order would be deemed prejudicial error.

Either of these requests might have affected the outcome of the case.

The state courts made no finding concerning the injury to respondent that might have resulted from the denial of the opportunity to take these steps. The District Court concluded that the absence of any pertinent evidence in the record makes it impossible to conclude, beyond a reasonable doubt, that respondent suffered no harm of the sort described. It cannot be said that the District Court erred in making that determination.

IV

The District Court and Court of Appeals conscientiously applied the standard of review applicable to habeas corpus proceedings embodied in 28 U. S. C. § 2254(d). Examination of the papers that have been submitted to us reveals the conclusions reached by each of the federal judges who has considered this case to be manifestly correct. Nevertheless, without affording respondent the opportunity to brief the issues presented, the Court summarily vacates the judgment below.

I dissent.

JUSTICE BLACKMUN, dissenting.

I would deny certiorari in this case because I am not at all persuaded that the United States Court of Appeals for the Ninth Circuit was wrong in affirming the District Court's decision to issue a writ of habeas corpus, or that the case presents an issue worthy of plenary review. I therefore dissent.

As the discussion that this case has generated illustrates, it is not simply a situation where the federal habeas courts have disregarded the guidance provided by *Sumner* v. *Mata*, 449 U. S. 539 (1981), and *Smith* v. *Phillips*, 455 U. S. 209 (1982). Nor does it involve a question over which the lower courts are confused or that is likely to recur often.

The Court indicates that the Ninth Circuit "affirmed on the basis that an unrecorded *ex parte* communication between trial judge and juror can never be harmless error," and with that proposition the Court "emphatically disagree[s]". *Ante*, at 117. While that interpretation of the Court of Appeals' opinion is possible, it certainly is not compelled. The entire discussion by the Court of Appeals on this issue is as follows:

> "The state court made no contemporary record of the *ex-parte* communication between judge and juror or even of the fact that it took place. In this case the district court correctly concluded that the condition of the record made it impossible to apply intelligently the harmless error test. *Chapman* v. *California*, 386 U. S. 18, 22 (1966). The court's explanation of its decision to grant the habeas writ referred to the inadequacy of the state's record and the need for extensive speculation in determining the extent of the error. See *Sumner*, 449 U. S. at 551. The harmless effect of conceded constitutional error cannot be established by speculation from a silent record." App. A to Pet. for Cert. 4–5.

The District Court had devoted what now provides 54 pages in the appendix to the petition for certiorari to a consideration whether the constitutional error assumed by the state courts could be determined to be harmless beyond a reasonable doubt in a post-trial hearing. The Ninth Circuit at that time had a rule that for certain constitutional errors, an after-the-fact determination of harmless error was impossible. The District Court concluded that the error here required automatic reversal. It then examined the record of the hearing and found its decision that no after-the-fact determination of harmlessness was possible reinforced by the paucity of evidence as to whether the juror, in fact, had been able to vote impartially. As I read those opinions, they indicate something far short of a determination that an unrecorded *ex parte* communication between a trial judge and a juror can never be harmless error.

This Court has not yet held that a federal habeas court is barred by principles of federalism from carrying out its statutory duty under 28 U. S. C. § 2254(d) to determine whether the state court's factual determination is fairly supported by the record. In *Smith* v. *Phillips*, *supra*, the Court found a conclusive presumption of juror bias inappropriate because it was not impossible to determine in an after-the-fact hearing whether the juror had been biased. Nothing in the opinion in that case, however, foreclosed the possibility that a conclusive presumption of bias might be called for in special circumstances. The concurring opinion pointed out:

> "[I]n certain instances a hearing may be inadequate for uncovering a juror's biases, leaving serious question whether the trial court had subjected the defendant to manifestly unjust procedures resulting in a miscarriage of justice. While each case must turn on its own facts, there are some extreme situations that would justify a finding of implied bias. Some examples might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction. Whether or not the state proceedings result in a finding of 'no bias,' the Sixth Amendment right to an impartial jury should not allow a verdict to stand under such circumstances." 455 U. S., at 222.

It added, in a footnote:

> "In the exceptional situations that may require application of an 'implied bias' doctrine, the lower federal courts need not be deterred by 28 U. S. C. § 2254(d), which provides that in a federal habeas proceeding 'a

> determination after a hearing on the merits of a factual issue . . . shall be presumed to be correct.'" *Id.*, at 222, n.

Each of these examples no doubt refers to a situation in which the juror's connection with a participant in the trial is undisclosed. Nevertheless, it is at least a close question whether this case, where the juror's friend was killed by the defendant's organization, should be included in the "extreme situations" list. In addition, as JUSTICE MARSHALL points out, a conclusive presumption of bias in this case is further supported by the fact that the State had the burden of proving beyond a reasonable doubt that the defendant had suffered no injury from the admitted constitutional error.*

Inasmuch as the case primarily involves the application of settled law to a highly unusual set of facts, I continue to feel that plenary review of the case is unnecessary. Because the questions are close, and because a fair reading of the guidance this Court already has given suggests that the result the Ninth Circuit reached was correct, I am inclined to feel that the Court's summary "rap on the knuckles" disposition of the federal courts' efforts to perform their statutory and constitutional duties is not warranted.

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*JUSTICE STEVENS suggests that the constitutional error here was mischaracterized as a deprivation of the right to counsel and to be present at critical stages of the trial, rather than as a denial of the right to be tried by an impartial jury. Even assuming that he is correct, the fact is, as the Court notes, see *ante*, at 117–118, n. 2, that petitioners have conceded and the courts below have assumed that respondent's constitutional rights to counsel and to be present at critical stages of the trial were violated. On the basis of that assumption, the dispute has centered on whether respondent was harmed by that error, in particular whether respondent was harmed by juror bias. In light of the framework in which the analysis has been cast, JUSTICE STEVENS' view that the question whether juror Fagan was biased has not been raised appears to me to be unnecessarily narrow.

UNITED STATES *v.* MENDOZA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82-849. Argued November 2, 1983—Decided January 10, 1984

Respondent, a Filipino national, filed a petition for naturalization under the Nationality Act of 1940, as amended, asserting that he had been denied due process of law by the Government's administration of the Act with regard to the naturalization in the Philippines in 1945 and 1946 of noncitizens who had served in the Armed Forces of the United States during World War II. The naturalization examiner recommended denial of the petition, but the Federal District Court granted the petition without reaching the merits of respondent's constitutional claim. The court held that the Government was collaterally estopped from litigating the constitutional issue because of an earlier, unappealed Federal District Court decision against the Government in a case brought by other Filipino nationals. The Court of Appeals affirmed.

Held: The United States may not be collaterally estopped on an issue such as the one involved here, adjudicated against it in an earlier lawsuit brought by a different party. Pp. 158-164.

(a) Under the doctrine of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation. However, the doctrine of nonmutual offensive collateral estoppel, under which a nonparty to a prior lawsuit may make "offensive" use of collateral estoppel against a party to the prior suit, is limited to private litigants and does not apply against the Government. Pp. 158-159.

(b) The Government is not in a position identical to that of a private litigant, both because of the geographic breadth of Government litigation and also, most importantly, because of the nature of the issues the Government litigates, frequently involving legal questions of substantial public importance. A rule allowing nonmutual collateral estoppel against the Government would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue, and would require substantial revision of the Solicitor General's policy for determining when to appeal an adverse decision, a policy that involves consideration of a variety of factors, such as the Government's limited resources and the crowded court dockets. Pp. 159-162.

(c) The conduct of Government litigation in the federal courts is sufficiently different from the conduct of private civil litigation in those courts so that what might otherwise be economy interests underlying a broad application of nonmutual collateral estoppel are outweighed by the constraints which peculiarly affect the Government. Pp. 162–163.

672 F. 2d 1320, reversed.

REHNQUIST, J., delivered the opinion for a unanimous Court.

Deputy Solicitor General Geller argued the cause for the United States. With him on the briefs were *Solicitor General Lee* and *Joshua I. Schwartz.*

Donald L. Ungar argued the cause for respondent. With him on the brief was *Lawrence N. DiCostanzo.*

JUSTICE REHNQUIST delivered the opinion of the Court.

In 1978 respondent Sergio Mendoza, a Filipino national, filed a petition for naturalization under a statute which by its terms had expired 32 years earlier.[1] Respondent's claim for naturalization was based on the assertion that the Government's administration of the Nationality Act denied him due process of law. Neither the District Court nor the Court of Appeals for the Ninth Circuit ever reached the merits of his claim, because they held that the Government was collaterally estopped from litigating that constitutional issue in view of an earlier decision against the Government in a case brought by other Filipino nationals in the United States District Court for the Northern District of California. We hold that the United States may not be collaterally estopped on an issue such as this, adjudicated against it in an earlier lawsuit brought by a different party. We therefore reverse the judgment of the Court of Appeals.

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[1] Mendoza sought naturalization pursuant to §§ 701–705 of the Nationality Act of 1940, 54 Stat. 1137, added by the Second War Powers Act, 1942, 56 Stat. 182, as amended, 8 U. S. C. §§ 1001–1005 (1940 ed., Supp. V).

The facts bearing on respondent's claim to naturalization are not in dispute. In 1942 Congress amended the Nationality Act, § 701 of which provided that noncitizens who served honorably in the Armed Forces of the United States during World War II were exempt from some of the usual requirements for nationality. In particular, such veterans were exempt from the requirement of residency within the United States and literacy in the English language. Congress later provided by amendment that all naturalization petitions seeking to come under § 701 must be filed by December 31, 1946. Act of Dec. 28, 1945, § 202(c), 59 Stat. 658. Section 702 of the Act provided for the overseas naturalization of aliens in active service who were eligible for naturalization under § 701 but who were not within the jurisdiction of any court authorized to naturalize aliens. In order to implement that provision, the Immigration and Naturalization Service from 1943 to 1946 sent representatives abroad to naturalize eligible alien servicemen.

Respondent Mendoza served as a doctor in the Philippine Commonwealth Army from 1941 until his discharge in 1946. Because Japanese occupation of the Philippines had made naturalization of alien servicemen there impossible before the liberation of the Islands, the INS did not designate a representative to naturalize eligible servicemen there until 1945. Because of concerns expressed by the Philippine Government to the United States, however, to the effect that large numbers of Filipinos would be naturalized and would immigrate to the United States just as the Philippines gained their independence, the Attorney General subsequently revoked the naturalization authority of the INS representative. Thus all naturalizations in the Philippines were halted for a 9-month period from late October 1945 until a new INS representative was appointed in August 1946.

Respondent's claim for naturalization is based on the contention that that conduct of the Government deprived him of due process of law in violation of the Fifth Amendment to the United States Constitution, because he was present in the

Philippines during part, but not all, of the 9-month period during which there was no authorized INS representative there. The naturalization examiner recommended denial of Mendoza's petition, but the District Court granted the petition without reaching the merits of Mendoza's constitutional claim. The District Court concluded that the Government could not relitigate the due process issue because that issue had already been decided against the Government in *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (ND Cal. 1975) (hereinafter *68 Filipinos*), a decision which the Government had not appealed.[2]

Noting that the doctrine of nonmutual offensive collateral estoppel has been conditionally approved by this Court in *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322 (1979), the

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[2] In *68 Filipinos*, the District Court considered the naturalization petitions of 68 Filipino World War II veterans filed pursuant to §§ 701–702 of the Nationality Act. Fifty-three of those veterans, whom the District Court designated as Category II veterans, like Mendoza, had made no effort to become naturalized before the expiration of the statutory provisions. Like Mendoza, they claimed that the failure of the United States to station an INS representative in the Philippines for the entire period of time in which rights under § 702 were available to them discriminated against Filipinos as a class. Rejecting the Government's arguments that *INS* v. *Hibi*, 414 U. S. 5 (1973) *(per curiam)*, was controlling, that the issue was nonjusticiable, and that petitioners were not protected by the Federal Constitution during the period at issue, the court applied strict scrutiny to petitioners' claim and held that the Government had not offered sufficient justification for its conduct. 406 F. Supp., at 940–951.

Although the Government initially docketed an appeal from that decision, the Court of Appeals granted the Government's motion to withdraw the appeal on November 30, 1977. The Government made that motion after a new administration and a new INS Commissioner had taken office. Eventually the Government reevaluated its position and decided to take appeals from all orders granting naturalization to so-called Category II petitioners, with the exception of orders granting naturalization to petitioners who filed petitions prior to the withdrawal of the appeal in *68 Filipinos*. Brief for United States 11–12, and n. 13; *Olegario* v. *United States*, 629 F. 2d 204, 214 (CA2 1980), cert. denied, 450 U. S. 980 (1981). Mendoza's petition for naturalization was filed after the Government withdrew its appeal in *68 Filipinos*.

Court of Appeals concluded that the District Court had not abused its discretion in applying that doctrine against the United States in this case. 672 F. 2d 1320, 1322 (1982). The Court of Appeals rejected the Government's argument that *Parklane Hosiery* should be limited to private litigants. Although it acknowledged that the Government is often involved in litigating issues of national significance where conservation of judicial resources is less important than "getting a second opinion," it concluded that litigation concerning the rights of Filipino war veterans was not such a case. 672 F. 2d, at 1329–1330. For the reasons which follow, we agree with the Government that *Parklane Hosiery*'s approval of nonmutual offensive collateral estoppel is not to be extended to the United States.

Under the judicially developed doctrine of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation. *Montana* v. *United States*, 440 U. S. 147, 153 (1979). Collateral estoppel, like the related doctrine of res judicata,[3] serves to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen* v. *McCurry*, 449 U. S. 90, 94 (1980). In furtherance of those policies, this Court in recent years has broadened the scope of the doctrine of collateral estoppel beyond its common-law limits. *Ibid.* It has done so by abandoning the requirement of mutuality of parties, *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313 (1971), and by conditionally approving the

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[3] Under res judicata, a final judgment on the merits bars further claims by parties or their privies on the same cause of action. *Montana* v. *United States*, 440 U. S., at 153; *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322, 326, n. 5 (1979). The Restatement of Judgments speaks of res judicata as "claim preclusion" and of collateral estoppel as "issue preclusion." Restatement (Second) of Judgments § 27 (1982).

"offensive" use of collateral estoppel by a nonparty to a prior lawsuit. *Parklane Hosiery, supra.*[4]

In *Standefer* v. *United States*, 447 U. S. 10, 24 (1980), however, we emphasized the fact that *Blonder-Tongue* and *Parklane Hosiery* involved disputes over private rights between private litigants. We noted that "[i]n such cases, no significant harm flows from enforcing a rule that affords a litigant only one full and fair opportunity to litigate an issue, and [that] there is no sound reason for burdening the courts with repetitive litigation." 447 U. S., at 24. Here, as in *Montana* v. *United States, supra*, the party against whom the estoppel is sought is the United States; but here, unlike in *Montana*, the party who seeks to preclude the Government from relitigating the issue was not a party to the earlier litigation.[5]

We have long recognized that "the Government is not in a position identical to that of a private litigant," *INS* v. *Hibi*, 414 U. S. 5, 8 (1973) *(per curiam)*, both because of the geographic breadth of Government litigation and also, most importantly, because of the nature of the issues the Government litigates. It is not open to serious dispute that the Government is a party to a far greater number of cases on a nationwide basis than even the most litigious private entity; in 1982, the United States was a party to more than 75,000 of the 206,193 filings in the United States District Courts. Administrative Office of the United States Courts, Annual Report of the Director 98 (1982). In the same year the United States was a party to just under 30% of the civil cases appealed from the District Courts to the Court of Appeals. *Id.*, at 79, 82. Government litigation frequently involves legal questions of substantial public importance; indeed, because the proscriptions of the United States Constitution are so generally directed at governmental action, many constitutional questions can arise only in the context of litigation to which the Government is a party. Because of those facts the Government is more likely than any private party to be involved in lawsuits against different parties which nonetheless involve the same legal issues.

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[4] Offensive use of collateral estoppel occurs when a plaintiff seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against the same or a different party. Defensive use of collateral estoppel occurs when a defendant seeks to prevent a plaintiff from relitigating an issue the plaintiff has previously litigated unsuccessfully in another action against the same or a different party. *Parklane Hosiery, supra*, at 326, n. 4.

[5] In *Montana* we held that the Government was estopped from relitigating in federal court the constitutionality of Montana's gross receipts tax on contractors of public construction firms. That issue had previously been litigated in state court by an individual contractor whose litigation had been totally financed and controlled by the Federal Government. *Montana* v. *United States, supra*, at 151, 155; see n. 9, *infra*.

A rule allowing nonmutual collateral estoppel against the Government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari. See *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U. S. 112, 135, n. 26 (1977); see also *Califano* v. *Yamasaki*, 442 U. S. 682, 702 (1979). Indeed, if nonmutual estoppel were routinely applied against the Government, this Court would have to revise its practice of waiting for a conflict to develop before granting the Government's petitions for certiorari. See this Court's Rule 17.1.

The Solicitor General's policy for determining when to appeal an adverse decision would also require substantial revision.[6] The Court of Appeals faulted the Government in this case for failing to appeal a decision that it now contends is erroneous. 672 F. 2d, at 1326–1327. But the Government's litigation conduct in a case is apt to differ from that of a private litigant. Unlike a private litigant who generally does not forgo an appeal if he believes that he can prevail, the Solicitor General considers a variety of factors, such as the limited resources of the Government and the crowded dockets of the courts, before authorizing an appeal. Brief for United States 30–31. The application of nonmutual estoppel against the Government would force the Solicitor General to abandon those prudential concerns and to appeal every adverse decision in order to avoid foreclosing further review.

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[6] The Attorney General has delegated discretionary authority to the Solicitor General to determine when to appeal from a judgment adverse to the interests of the United States. 28 CFR § 0.20(b) (1983).

In addition to those institutional concerns traditionally considered by the Solicitor General, the panoply of important public issues raised in governmental litigation may quite properly lead successive administrations of the Executive Branch to take differing positions with respect to the resolution of a particular issue. While the Executive Branch must of course defer to the Judicial Branch for final resolution of questions of constitutional law, the former nonetheless controls the progress of Government litigation through the federal courts. It would be idle to pretend that the conduct of Government litigation in all its myriad features, from the decision to file a complaint in the United States district court to the decision to petition for certiorari to review a judgment of the court of appeals, is a wholly mechanical procedure which involves no policy choices whatever.

For example, in recommending to the Solicitor General in 1977 that the Government's appeal in *68 Filipinos* be withdrawn, newly appointed INS Commissioner Castillo commented that such a course "would be in keeping with the policy of the [new] Administration," described as "a course of compassion and amnesty." Brief for United States 11. But for the very reason that such policy choices are made by one administration, and often reevaluated by another administration, courts should be careful when they seek to apply expanding rules of collateral estoppel to Government litigation. The Government of course may not now undo the consequences of its decision not to appeal the District Court judgment in the *68 Filipinos* case; it is bound by that judgment under the principles of res judicata. But we now hold that it is not further bound in a case involving a litigant who was not a party to the earlier litigation.

The Court of Appeals did not endorse a routine application of nonmutual collateral estoppel against the Government, because it recognized that the Government does litigate issues of far-reaching national significance which in some cases, it concluded, might warrant relitigation. But in this case it found no "record evidence" indicating that there was a "crucial need" in the administration of the immigration laws for a redetermination of the due process question decided in *68 Filipinos* and presented again in this case. 672 F. 2d, at 1329–1330. The Court of Appeals did not make clear what sort of "record evidence" would have satisfied it that there *was* a "crucial need" for redetermination of the question in this case, but we pretermit further discussion of that approach; we believe that the standard announced by the Court of Appeals for determining when relitigation of a legal issue is to be permitted is so wholly subjective that it affords no guidance to the courts or to the Government. Such a standard leaves the Government at sea because it cannot possibly anticipate, in determining whether or not to appeal an adverse decision, whether a court will bar relitigation of the issue in a later case. By the time a court makes its subjective determination that an issue cannot be relitigated, the Government's appeal of the prior ruling of course would be untimely.

We hold, therefore, that nonmutual offensive collateral estoppel simply does not apply against the Government in such a way as to preclude relitigation of issues such as those involved in this case.[7] The conduct of Government litigation in the courts of the United States is sufficiently different from the conduct of private civil litigation in those courts so that what might otherwise be economy interests underlying a broad application of collateral estoppel are outweighed by the constraints which peculiarly affect the Government. We think that our conclusion will better allow thorough development of legal doctrine by allowing litigation in multiple forums. Indeed, a contrary result might disserve the economy interests in whose name estoppel is advanced by requiring the Government to abandon virtually any exercise of discretion in seeking to review judgments unfavorable to it. The doctrine of res judicata, of course, prevents the Government from relitigating the same cause of action against the parties to a prior decision,[8] but beyond that point principles of nonmutual collateral estoppel give way to the policies just stated.

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[7] The Government does not base its argument on the exception to the doctrine of collateral estoppel for "unmixed questions of law" arising in "successive actions involving unrelated subject matter." *Montana* v.

Our holding in this case is consistent with each of our prior holdings to which the parties have called our attention, and which we reaffirm. Today in a companion case we hold that the Government may be estopped under certain circumstances from relitigating a question when the parties to the two lawsuits are the same. *United States* v. *Stauffer Chemical Co., post,* p. 165; see also *Montana* v. *United States,* 440 U. S. 147 (1979); *United States* v. *Moser,* 266 U. S. 236 (1924). None of those cases, however, involve the effort of a party to estop the Government in the absence of mutuality.

The concerns underlying our disapproval of collateral estoppel against the Government are for the most part inappli-

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United States, 440 U. S., at 162; see *United States* v. *Stauffer Chemical Co., post,* p. 165; *United States* v. *Moser,* 266 U. S. 236, 242 (1924). Our holding in no way depends on that exception.

[8] In *Nevada* v. *United States,* 463 U. S. 110 (1983), we applied principles of res judicata against the United States as to one class of claimants who had not been parties to an earlier adjudication, *id.,* at 143–144, but we recognized that this result obtained in the unique context of "a comprehensive adjudication of water rights intended to settle once and for all the question of how much of the Truckee River each of the litigants was entitled to." *Id.,* at 143.

cable where mutuality is present, as in *Stauffer Chemical*, *Montana*,[9] and *Moser*. The application of an estoppel when the Government is litigating the same issue with the same party avoids the problem of freezing the development of the law because the Government is still free to litigate that issue in the future with some other party. And, where the parties are the same, estopping the Government spares a party that has already prevailed once from having to relitigate—a function it would not serve in the present circumstances. We accordingly hold that the Court of Appeals was wrong in applying nonmutual collateral estoppel against the Government in this case. Its judgment is therefore

Reversed.

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[9] In *Montana* an individual contractor brought an initial action to challenge Montana's gross receipts tax in state court, and the Federal Government brought a second action in federal court raising the same challenge. The Government totally controlled and financed the state-court action; thus for all practical purposes, there was mutuality of parties in the two cases. "[T]he United States plainly had a sufficient 'laboring oar' in the conduct of the state-court litigation," 440 U. S., at 155, to be constituted a "party" in all but a technical sense.

UNITED STATES *v.* STAUFFER CHEMICAL CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 82-1448. Argued November 2, 1983—Decided January 10, 1984

When officials of the Environmental Protection Agency (EPA) and the State of Tennessee, accompanied by employees of a private firm under contract to EPA, attempted to inspect one of respondent's Tennessee plants, respondent refused entry to the private contractors unless they would sign an agreement not to disclose trade secrets. The private contractors refused to do so, and EPA later obtained an administrative warrant authorizing the private employees to conduct the inspection. After respondent refused to honor the warrant, the Government began a civil contempt proceeding against respondent in Federal District Court in Tennessee, and respondent moved to quash the warrant on the ground that private contractors are not "authorized representatives" under § 114(a)(2) of the Clean Air Act for the purposes of conducting inspections of premises subject to regulation under the Act. The court denied respondent's motion, and on appeal respondent reiterated its statutory argument and also asserted that the Government should be collaterally estopped from asserting that § 114(a)(2) authorizes private contractors to conduct inspections, because of a contrary decision of the Court of Appeals for the Tenth Circuit in a case involving the same parties which arose from respondent's similar refusal to allow private contractors, accompanying EPA and Wyoming officials, to enter and inspect one of respondent's Wyoming plants. The Court of Appeals in the present case reversed the District Court, agreeing with respondent both on the merits of the statutory issue and, alternatively, on the collateral-estoppel issue.

Held: The doctrine of mutual defensive collateral estoppel is applicable against the Government to preclude relitigation of the same issue already litigated against the same party in another case involving virtually identical facts. Cf. *Montana* v. *United States*, 440 U. S. 147. Pp. 169–174.

(a) The doctrine of collateral estoppel generally applies to preclude relitigation of both issues of law and issues of fact if those issues were conclusively determined in a prior action involving the same parties. The exception to the applicability of the principles of collateral estoppel for "unmixed questions of law" arising in "successive actions involving unrelated subject matter," *Montana* v. *United States*, *supra*, at 162, does not apply here. Whatever the purpose or extent of the exception, there is no reason to apply it here to allow the Government to litigate twice with the same party an issue arising in both cases from virtually identical facts. Pp. 169–172.

(b) Nor is an exception to the doctrine of mutual defensive estoppel justified here on the asserted ground that its application in Government litigation involving recurring issues of public importance will freeze the development of the law. That argument is persuasive only to prevent the application of collateral estoppel against the Government in the absence of mutuality. While the Sixth Circuit's decision prevents EPA from relitigating the § 114(a)(2) issue with respondent, it still leaves EPA free to litigate the same issue in the future with other litigants. Pp. 173–174.

684 F. 2d 1174, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. WHITE, J., filed an opinion concurring in the result, *post*, p. 174.

Deputy Solicitor General Claiborne argued the cause for the United States. With him on the briefs were *Solicitor General Lee, Acting Assistant Attorney General Walker, Joshua I. Schwartz*, and *Dirk D. Snel*.

Charles F. Lettow argued the cause and filed a brief for respondent.

JUSTICE REHNQUIST delivered the opinion of the Court.

In March 1980, when the Environmental Protection Agency (EPA) tried to inspect one of respondent Stauffer Chemical Co.'s Tennessee plants using private contractors in addition to full-time EPA employees, Stauffer refused to allow the private contractors to enter the plant. Stauffer argues that private contractors are not "authorized representatives" as that term is used in § 114(a)(2) of the Clean Air Act, 84 Stat. 1687, 42 U. S. C. § 7414(a)(2) (1976 ed., Supp. V). Stauffer also argues that the Government should be estopped from relitigating the question of whether private contractors are "authorized representatives" under the statute because it has already litigated that question against Stauffer and lost in connection with an attempted inspection of one of Stauffer's plants in Wyoming. The Court of Appeals agreed with Stauffer on the merits and also on the collateral-estoppel issue. Without reaching the merits, we affirm the Court of Appeals' holding that the Government is estopped from relitigating the statutory issue against Stauffer.

On March 27, 1980, officials from EPA and the State of Tennessee, accompanied by employees of a private firm under contract to EPA, attempted to inspect Stauffer's elemental phosphorus production plant in Mt. Pleasant, Tenn. Stauffer refused entry to the private contractors unless they would sign an agreement not to disclose trade secrets. When the private contractors refused to do so, the entire group left without making the inspection. EPA later obtained an administrative warrant authorizing the private employees to conduct the inspection, and Stauffer refused to honor the warrant.

On the following day, EPA began a civil contempt proceeding against Stauffer in Federal District Court in Tennessee, and Stauffer simultaneously moved to quash the warrant. It argued that private contractors are not "authorized representatives" under § 114(a)(2) of the Clean Air Act for the purposes of conducting inspections of premises subject to regulation under that Act.[1] The District Court denied Stauffer's motion to quash, accepting EPA's argument that the inspection authority conferred upon "authorized representatives" by the statute extends to private contractors retained by EPA. 511 F. Supp. 744 (MD Tenn. 1981).

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[1] To carry out its role under the Clean Air Act of supervising the States in their enforcement of national air quality standards, see 84 Stat. 1678, 1680, 1685, 42 U. S. C. §§ 7407, 7410, 7412 (1976 ed., Supp. V), EPA annually inspects approximately 10% of the major stationary sources of air pollution within each State. See Brief for United States 1, n. 2. Section 114(a)(2) provides that "the Administrator or his authorized representative, upon presentation of his credentials . . . shall have a right of entry" to conduct such inspections. 42 U. S. C. § 7414(a)(2) (1976 ed., Supp. V).

On appeal, Stauffer reiterated its statutory argument and also asserted that the Government should be collaterally estopped on the basis of the decision in *Stauffer Chemical Co. v. EPA*, 647 F. 2d 1075 (CA10 1981) (hereinafter *Stauffer I*), from contending that § 114(a)(2) authorizes private contractors to conduct inspections of Stauffer's plants. In *Stauffer I* officials of EPA and the State of Wyoming, accompanied by employees of a different private firm under contract to EPA, attempted to conduct an inspection of Stauffer's phosphate ore processing plant near Sage, Wyo. As in the present case, Stauffer insisted that the private contractors sign a nondisclosure agreement, and when they declined to do so, Stauffer refused to allow them to enter the plant. EPA obtained an administrative warrant authorizing the private contractors to conduct the inspection, and Stauffer refused to honor the warrant. Stauffer then instituted an action in United States District Court in Wyoming seeking to quash the warrant and to enjoin EPA from using private contractors in inspecting Stauffer's Wyoming plants. The District Court issued the injunction, and the United States Court of Appeals for the Tenth Circuit affirmed, holding that private contractors are not "authorized representatives" pursuant to § 114(a)(2). *Id.*, at 1079.

The Sixth Circuit in the present case (hereinafter *Stauffer II*) reversed the District Court, adopting alternative grounds for its decision. Judge Weick, who delivered the opinion of the court, agreed with the Tenth Circuit that private contractors are not authorized to conduct inspections under the Clean Air Act. 684 F. 2d 1174, 1181–1190 (1982). Relying on *Montana* v. *United States*, 440 U. S. 147 (1979), he also held that the Government was collaterally estopped by *Stauffer I* from litigating the statutory question again against Stauffer. 684 F. 2d, at 1179–1181.[2] Judge Jones wrote a separate opinion concurring on the collateral-estoppel issue and concluding that it was inappropriate for the court to reach the merits. *Id.*, at 1190–1192. Judge Siler also wrote separately, dissenting from Judge Weick's opinion on the collateral-estoppel issue but concurring in his opinion on the merits. *Id.*, at 1192–1193. For the reasons which follow, we agree that the doctrine of mutual defensive collateral estoppel is applicable against the Government to preclude relitigation of the same issue already litigated against the same party in another case involving virtually identical facts. Accordingly, we affirm the judgment of the Court of Appeals without reaching the merits.

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[2] Stauffer raised its estoppel argument for the first time in the Court of Appeals. It did not argue to the District Court in Tennessee that EPA should be estopped by the prior decision of the Wyoming District Court in *Stauffer I*. Although the Wyoming District Court had decided *Stauffer I*

In *Montana* v. *United States*, *supra*, we held that the United States was estopped from relitigating in federal court the question of whether the Montana gross receipts tax on contractors of public, but not private, construction firms violates the Supremacy Clause of the United States Constitution. A public contractor, financed and directed by the Federal Government, had already litigated that question in state court, and the Montana Supreme Court unanimously had upheld the tax. In approving the defensive use of collateral estoppel against the Government in *Montana*, we first determined that there was mutuality of parties, see *United States* v. *Mendoza*, *ante*, at 164, n. 9, that the issue sought to be relitigated was identical to the issue already unsuccessfully litigated in state court, and that there had been no change in controlling facts or legal principles since the state-court action. 440 U. S., at 155–162.

We next looked to see whether there were any special circumstances warranting an exception to the otherwise applicable rules of preclusion. One exception which we

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by the time the Tennessee District Court decided this case, it had relied on alternative grounds for its decision. See *In re Stauffer Chemical Co.*, 14 ERC 1737 (1980). By the time this case reached the Sixth Circuit, however, the Tenth Circuit had affirmed the District Court in *Stauffer I* solely on the ground that § 114(a)(2) does not authorize inspections by private contractors.

mentioned as possibly relevant is the exception for "unmixed questions of law" arising in "successive actions involving unrelated subject matter." *Id.*, at 162; see *United States* v. *Moser*, 266 U. S. 236, 242 (1924). Noting that the exception first articulated in *Moser* is "difficult to delineate," 440 U. S., at 163, we nonetheless had no trouble finding it inapplicable in *Montana* because of the close alignment in both time and subject matter between the federal-court and the state-court actions. *Ibid.*[3]

Like *Montana* the case at bar involves the defensive use of collateral estoppel against the Government by a party to a prior action. The Government does not argue that the § 114(a)(2) issues in *Stauffer I* and *Stauffer II* are dissimilar nor that controlling law or facts have changed since *Stauffer I*. The Government instead argues that an exception to the normal rules of estoppel should apply because the statutory question here is an "unmixed question of law" arising in substantially unrelated actions. It also argues that the special role of the Government in litigating recurring issues of public importance warrants an exception in cases such as this one. We disagree with both of the Government's arguments.

As commonly explained, the doctrine of collateral estoppel can apply to preclude relitigation of both issues of law and issues of fact if those issues were conclusively determined in a prior action. *United States* v. *Mendoza, ante,* p. 154; *Allen* v. *McCurry,* 449 U. S. 90, 94 (1980). Our cases, however, recognize an exception to the applicability of the principles of collateral estoppel for "unmixed questions of law" arising in "successive actions involving unrelated subject matter." *Montana* v. *United States, supra,* at 162; see also *Allen* v. *McCurry, supra,* at 95, n. 7; *United States* v. *Moser, supra,* at 242. While our discussion in *Montana* indicates that the exception is generally recognized, we are frank to admit uncertainty as to its application. The exception seems to require a determination as to whether an "issue of fact" or an "issue of law" is sought to be relitigated and then a determination as to whether the "issue of law" arises in a successive case that is so unrelated to the prior case that relitigation of the issue is warranted. Yet we agree that, for the purpose of determining when to apply an estoppel,

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[3] The description of the exception in *United States* v. *Moser* is not very illuminating. There we stated:

"[Estoppel] does not apply to unmixed questions of law. Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. But a *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law." 266 U. S., at 242 (emphasis in original).

In *Montana* we paraphrased the exception as applying to "issues of law [which] arise in successive actions involving unrelated subject matter." 440 U. S., at 162.

> "[w]hen the claims in two separate actions between the same parties are the same or are closely related . . . it is not ordinarily necessary to characterize an issue as one of fact or of law for purposes of issue preclusion. . . . In such a case, it is unfair to the winning party and an unnecessary burden on the courts to allow repeated litigation of the same issue in what is essentially the same controversy, even if the issue is regarded as one of 'law'." Restatement (Second) of Judgments § 28, Comment *b* (1982).[4]

Thus in *Montana,* without assigning the label "issue of law" to the claim sought to be relitigated, we determined that the exception was inapplicable because of the close alignment of time and subject matter between the state-court action and the federal-court action. If the exception was inapplicable in *Montana*, as we held that it was, we have no trouble concluding that it is also inapplicable here.

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[4] An exception which requires a rigid determination of whether an issue is one of fact, law, or mixed fact and law, as a practical matter, would often be impossible to apply because "the journey from a pure question of fact to a pure question of law is one of subtle gradations rather than one marked by a rigid divide." Restatement (Second) of Judgments § 28, Comment *b* (1982).

Both *Stauffer I* and *Stauffer II* arose as a result of EPA's overview inspection program for supervising state efforts to enforce national air quality standards. See n. 1, *supra*. In both cases private contractors, in addition to EPA and state employees, tried to inspect plants owned by respondent. The inspections occurred just over two weeks apart, and in each case, Stauffer refused to allow the private contractors to enter its plant. Any factual differences between the two cases, such as the difference in the location of the plants and the difference in the private contracting firms involved, are of no legal significance whatever in resolving the issue presented in both cases.

Admittedly the purpose underlying the exception for "unmixed questions of law" in successive actions on unrelated claims is far from clear. But whatever its purpose or extent, we think that there is no reason to apply it here to allow the Government to litigate twice with the same party an issue arising in both cases from virtually identical facts. Indeed we think that applying an exception to the doctrine of mutual defensive estoppel in this case would substantially frustrate the doctrine's purpose of protecting litigants from burdensome relitigation and of promoting judicial economy. See *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322, 326 (1979).[5]

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[5] The Government argues for a broader interpretation of the exception. Relying on *Moser*'s language that parties are not estopped in a "subsequent action upon a different demand," *United States* v. *Moser*, 266 U. S., at 242, the Government argues that two cases must have more in common than the same parties and the same legal issue to constitute the same "demand" for estoppel purposes. Thus the Government's argument essentially is that two cases presenting the same legal issue must arise from the very same facts or transaction before an estoppel can be applied. Whatever applicability that interpretation may have in the tax context, see *Commissioner* v. *Sunnen*, 333 U. S. 591, 601–602 (1948) (refusing to apply an estoppel

The Government attempts unpersuasively to supply justifications for overriding those economy concerns and allowing relitigation in cases such as this one. It argues here, as it did in *United States* v. *Mendoza, ante*, p. 154, that the application of collateral estoppel in Government litigation involving recurring issues of public importance will freeze the development of the law. But we concluded in *United States* v. *Mendoza* that that argument is persuasive only to prevent the application of collateral estoppel against the Government in the absence of mutuality. When estoppel is applied in a case where the Government is litigating the same issue arising under virtually identical facts against the same party, as here, the Government's argument loses its force. The Sixth Circuit's decision prevents EPA from relitigating the § 114(a)(2) issue with Stauffer, but it still leaves EPA free to litigate the same issue in the future with other litigants.[6]

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when two tax cases presenting the same issue arose from "separable facts"), we reject its general applicability outside of that context.

[6] Thus the application of an estoppel in cases such as this one will require no alteration of this Court's practice of waiting for conflicts to develop before granting the Government's petitions for certiorari, nor in the Solicitor General's policy of circumspection in determining when to pursue appeals or file certiorari petitions. See *United States* v. *Mendoza, ante*, p. 154.

The Government argues, however, that in deciding whether to appeal an adverse decision, the Solicitor General has no way of knowing whether future litigation will arise with the same or a different party. The Government thus argues that the mere possibility of being bound in the future will influence the Solicitor General to appeal or seek certiorari from adverse decisions when such action would otherwise be unwarranted. The Government lists as an example *Stauffer I*, from which the Government did not seek certiorari because there was no circuit conflict at the time of the Tenth Circuit's decision. Yet, taking the issue here as an example, the Government itself asserts that "thousands of businesses are affected each year by the question of contractor participation in Section 114 inspections." Brief for United States 28. It is thus unrealistic to assume that the Government would be driven to pursue an unwarranted appeal here because of fear of being unable to relitigate the § 114 issue in the future with a different one of those thousands of affected parties.

The Government also argues that because EPA is a federal agency charged with administering a body of law nationwide, the application of collateral estoppel against it will require EPA to apply different rules to similarly situated parties, thus resulting in an inequitable administration of the law. For example, EPA points to the situation created by the recent decision in *Bunker Hill Company Lead & Zinc Smelter* v. *EPA*, 658 F. 2d 1280 (1981), where the Ninth Circuit accepted EPA's argument that § 114(a)(2) authorizes inspections by private contractors. EPA argues that if it is foreclosed from relitigating the statutory issue with Stauffer, then Stauffer plants within the Ninth Circuit will benefit from a rule precluding inspections by private contractors while plants of Stauffer's competitors will be subject to the Ninth Circuit's contrary rule. Tr. of Oral Arg. 17–18. Whatever the merits of EPA's argument, for the purpose of deciding this case, it is enough to say that the issue of whether EPA would be estopped in the Ninth Circuit is not before the Court. Following our usual practice of deciding no more than is necessary to dispose of the case before us, we express no opinion on that application of collateral estoppel.

We therefore find the Government's arguments unpersuasive in this case as justifications for limiting otherwise applicable rules of estoppel. Because we conclude that the Court of Appeals was correct in applying the doctrine of collateral estoppel against the Government here, we decline to reach the merits of the statutory question in this case. See *Montana* v. *United States*, 440 U. S., at 153. On the estoppel issue, therefore, the judgment of the Court of Appeals is

Affirmed.

JUSTICE WHITE, concurring in the result.

I agree with the majority that within the Tenth Circuit Stauffer is insulated from further litigation with the EPA on the private contractor issue. Though it is a harder question, I also agree that the court below correctly found that the EPA was barred from litigating this issue with Stauffer in the Sixth Circuit, which had not adopted a position on the merits. I write separately because I do not believe that estoppel should be applied any further than that.

I

Relying on *Montana* v. *United States*, 440 U. S. 147 (1979), the majority states that the limits to collateral estoppel on unmixed questions of law, whatever they may be, are not exceeded here where the Government has attempted "to litigate twice with the same party an issue arising in both cases from virtually identical facts." *Ante*, at 172. Two cases need not arise from the very same facts or transaction to constitute the same "demand." *Ante*, at 172, n. 5. "Any factual differences between the two cases, such as the difference in the location of the plants and the difference in the private contracting firms involved, are of no legal significance whatever in resolving the issue presented in both cases." *Ante*, at 172. Thus, this case falls squarely within *Montana*.

Montana's relevance to this case seems to me more limited. *Montana* involved duplicative suits, filed a month apart and each challenging the same state tax on the same contractor working on the same project. The two suits in this case do not seem to me to be as close as those in *Montana*. Assuming, however, that the two "demands" here are as closely related *factually* as those in *Montana*, application of collateral estoppel is still not compelled. The majority's reasoning would be plausible if the second attempted inspection occurred at a different plant and with a different contractor, but within the same circuit as the first. It may be of "legal significance," however, that the inspections occurred in different jurisdictions.

It is true that in *Montana* the first lawsuit was brought in state court and the second in federal. However, the two courts had concurrent jurisdiction. The Government had the initial choice of suing in either. Having made that choice, it was held to it. See 440 U. S., at 163. This case presents a different situation. The Wyoming inspection could not have been litigated in the Sixth Circuit; the Tennessee inspection could not have been litigated in the Tenth Circuit. It may be fair to say that if the second claim could not have been brought in the same court as the first, it is a different "demand." Cf. *Montana, supra,* at 153 (collateral estoppel is "central to the purpose for which civil courts have been established, the conclusive resolution of disputes *within their jurisdictions*") (emphasis added). In addition, there are considerations of comity in the state/federal situation that are not present as between two circuits. See, *e. g., Allen* v. *McCurry,* 449 U. S. 90, 95–96 (1980).

I do not rely on this conception of the same "demand," however. For even if *Montana*'s delineation of the same "demand" does extend beyond jurisdictional boundaries, there is no justification for applying collateral estoppel, which is a flexible, judge-made doctrine, in situations where the policy concerns underlying it are absent. The notion of the "same demand" is at most a guide to identifying instances where policy does support preclusion. The *Montana* Court itself was very careful to examine general policy reasons for and against preclusion. 440 U. S., at 155, 158–164. Its decision was anything but an inflexible application of preclusion. Because the two suits were on the same demand, the unmixed question of law exception did not apply; but *Montana* neither began nor ended with this question, and neither should the Court here. Preclusion must be evaluated in light of the policy concerns underlying the doctrine.

II

Collateral estoppel is generally said to have three purposes: to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen* v. *McCurry*, *supra*, at 94. It is plain that all three purposes are served by foreclosing further litigation on this issue between these parties in the Tenth Circuit, and that Stauffer should therefore be fully insulated against relitigation there. The Government argues that even in the Tenth Circuit it is entitled to attempt to inspect Stauffer with private contractors and to relitigate this issue "after an appropriate time," which it estimates at one year. Such an approach would authorize exactly the sort of duplicative litigation that collateral estoppel is designed to avoid. Cf. *United States* v. *Moser*, 266 U. S. 236 (1924). Thus, I unhesitatingly agree with the majority in its rejection of the Government's position.

III

Outside the Tenth Circuit, the policies of judicial economy and consistency are much less compelling. At least where, as here, one party is a governmental agency administering a public law, judicial economy is not advanced; the Government can always force a ruling on the merits by suing someone else. See *ante*, at 173. See generally *United States* v. *Mendoza*, *ante*, p. 154. And if the circuit has ruled on the merits in another case, reliance on *stare decisis* is no more burdensome than reliance on collateral estoppel. The policy against inconsistent decisions is much less relevant outside the original circuit. Conflicts in the circuits are generally accepted and in some ways even welcomed. Indeed, were consistency a compelling concern as between circuits, the decision of one circuit would bind the others even in litigation between two entirely different parties. That is not the route the federal courts have followed. However, applying collateral estoppel in other circuits would spare Stauffer the burden of fighting a battle that it has won once. In the absence of countervailing considerations, I am satisfied that this interest is adequate to support the lower court's ruling here. See *ante*, at 172.

IV

Preclusion was justified, however, only because the Sixth Circuit had not previously ruled on the Clean Air Act issue. Stauffer argues that *Stauffer I* also immunizes it in the Ninth Circuit, which has adopted a different rule than the Tenth on the merits. See *Bunker Hill Co. Lead & Zinc Smelter* v. *EPA*, 658 F. 2d 1280 (1981). Under this view private contractors may join EPA inspections of all plants in that Circuit except those owned by Stauffer. The majority does not address this contention, considering it "more than is necessary to dispose of the case before us." *Ante*, at 174. I do address it, however, for it is only because today's result does not afford Stauffer the blanket protection it seeks that I concur in the judgment.

A

Extending preclusion to circuits that have adopted a contrary rule on the merits would be acceptable were it supported by any affirmative policy. It is not. Judicial economy is not served for the simple reason that no litigation is prevented; the prior litigant is subject to one black-letter rule rather than another. For the same reason, there is no concern about protecting the prior litigant from repetitious, vexatious, or harassing litigation. Finally, to the extent the policy against inconsistent decisions remains relevant when a circuit conflict exists, it cuts the other way. At least some measure of consistency and certainty is obtained by evenhanded application of rules within individual circuits.

B

Not only is there no affirmative reason for preclusion in such circumstances, powerful considerations cut the other way. Cf. *Standefer* v. *United States*, 447 U. S. 10, 25 (1980). The inconsistency is more dramatic and more troublesome than a normal circuit split; by definition, it compounds that problem. It would be dubious enough were the EPA unable to employ private contractors to inspect Stauffer's plants within the Ninth Circuit even though it can use such contractors in inspecting other plants. But the disarray is more extensive. By the same application of mutual collateral estoppel, the EPA could presumably use private contractors to inspect Bunker Hill's plants in circuits like the Tenth, despite the fact that other companies are not subject to such inspections. Furthermore, Stauffer concedes, and today we hold in *Mendoza*, that the EPA can relitigate this matter as to other companies. As a result, in, say, the First Circuit, the EPA must follow one rule as to Bunker Hill, the opposite as to Stauffer, and, depending on any ruling by that Circuit, one or the other or a third as to other companies.

This confusing state of affairs far exceeds in awkwardness a normal split in the circuits. It is especially undesirable because it grants a special benefit to, or imposes a special detriment on, particular companies. In general, persons present in several circuits must conduct themselves in accordance with varying rules, just as they are subject to different state laws. Other companies with plants in several circuits do not enjoy a favorable rule nationwide, like Stauffer, nor do they have to put up with an unfavorable rule nationwide, like Bunker Hill. A split in the circuits cannot justify abandonment of all efforts at evenhanded and rational application of legal rules. Nor is the mere fact that these companies happen to have been involved in litigation elsewhere sufficient reason for uniquely favored or disfavored status.

Such misapplication of collateral estoppel has been condemned by this Court before. For example, in *United States* v. *Stone & Downer Co.*, 274 U. S. 225 (1927), it had been established in a prior action that certain imports were duty free. In a later suit involving the classification of similar goods imported by the same defendant, the Court of Customs Appeals refused to apply collateral estoppel and this Court affirmed. Application of the doctrine would mean that an importer, having once obtained a favorable judgment, would be able to undersell others, while an importer having lost a case would be unable to compete. "Such a result would lead to inequality in the administration of the customs law, to discrimination and to great injustice and confusion." *Id.*, at 236. The same concerns were evident in *Commissioner* v. *Sunnen*, 333 U. S. 591 (1948). There the Court noted the inequality that would flow from blanket application of collateral estoppel in the tax area. A taxpayer is not entitled to the benefit of his judgment if there has been "a subsequent . . . change or development in the controlling legal principles." *Id.*, at 599. Otherwise, he would enjoy preferential treatment. Such discrimination is to be avoided, because collateral estoppel "is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers." *Ibid.*

There is no real difference between those cases and this one. In each, the prior litigant escapes strictures that apply to others solely because he litigated the issue once before and prevailed. As the Restatement points out, "[r]efusal of preclusion is ordinarily justified if the effect of applying preclusion is to give one person a favored position in current administration of a law." Restatement (Second) of Judgments §28, Comment *c* (1982).[1]

C

Cases like *Sunnen* and *Stone & Downer* merely recognize that collateral estoppel on issues of law, which is a narrow, flexible, judge-made doctrine, becomes intolerable if the rule of law at issue is too far removed from the prevailing legal rules. Even Stauffer concedes that a decision from this Court on the merits would so affect the "controlling law" that it would lose the entire benefit of the initial judgment in its favor. Similarly, no one contends that if Congress amended the statute to make the opposite result plain, Stauffer could continue to rely on the original judgment. And presumably if the Tenth Circuit were to reverse itself, en banc, and hold that private contractors could make EPA inspections, then Stauffer would no longer be able to keep them out on the authority of *Stauffer I*. Finally, it is apparent that if, for example, Stauffer has plants in Canada, it cannot impose the Tenth Circuit's inspection requirements on the Canadian authorities. Why then should Stauffer be able to use the decisions of the Sixth and Tenth Circuits to estop the Government in the Ninth Circuit, where the opposite rule prevails? The decisions of those other Circuits are not the "controlling law" in the Ninth; the controlling law in the Ninth is exactly to the contrary. There is no difference between this situation and that where the law within a particular jurisdiction has changed since the initial decision.

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[1] According to the Restatement, relitigation of an issue is not precluded if "[t]he issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws . . . ." Restatement (Second) of Judgments § 28 (1982). Even if part (a) is inapplicable in the circumstances of this case, it seems clear to me that both prongs of part (b) apply to litigation in a circuit where the prevailing legal rule is different from that established in earlier litigation in another jurisdiction.

V

The doctrine of collateral estoppel is designed to ensure litigants the benefit of prior litigation; this is not the same as ensuring them the benefits of a prior ruling.[2] In arguing that *Stauffer I* precludes the EPA nationwide from relitigating this issue against it, Stauffer stretches the doctrine beyond the breaking point. It claims a right to a unique status. Put differently, Stauffer claims immunity from a particular legal rule, not immunity from further litigation. At this point considerations of economy are no longer involved, and Stauffer's approach leads to results that are basically inconsistent with the principle of evenhanded administration of the laws.

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[2] This distinction is perhaps reflected in the "same demand" limitation on estoppel on pure issues of law. As Professor Scott wrote four decades ago, "if a court erroneously holds that a gratuitous promise is binding, that holding is not conclusive as to subsequent contracts made between the same parties." Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1, 7 (1942). See also *United States* v. *Moser*, 266 U. S. 236, 242 (1924) (res judicata "does not apply to unmixed questions of law . . . [b]ut a *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action") (emphasis in original). The distinction is between an abstract legal proposition and the application of that proposition to particular facts.

In sum, I concur in the judgment of the Court. I do so with the view that preclusion is inappropriate in circuits that have adopted, or later adopt, the contrary legal rule.

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IMMIGRATION AND NATURALIZATION SERVICE *v.* PHINPATHYA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82-91. Argued October 3, 1983—Decided January 10, 1984

Section 244(a)(1) of the Immigration and Nationality Act (Act) authorizes the Attorney General, in his discretion, to suspend deportation of an otherwise deportable alien who "has been physically present in the United States for a continuous period of not less than seven years" and is a person of good moral character whose deportation would result in extreme hardship to the alien or his spouse, parent, or child. Respondent, a citizen of Thailand, first entered the United States as a nonimmigrant student in October 1969, and was authorized to remain until July 1971. But when her visa expired she chose to stay without securing permission from the immigration authorities. In 1977, petitioner Immigration and Naturalization Service commenced deportation proceedings against respondent. Conceding deportability, respondent applied for suspension pursuant to § 244(a)(1). Based on respondent's testimony that she had left the United States for Thailand during January 1974 and that she had improperly obtained a nonimmigrant visa from the United States consular officer in Thailand to aid her reentry three months later, an Immigration Judge concluded that respondent had failed to meet § 244(a)(1)'s 7-year "continuous physical presence" requirement and accordingly denied her application for suspension. The Board of Immigration Appeals (BIA) affirmed, holding that respondent's absence from the United States was meaningfully interruptive of her continuous physical presence in the country, since she was illegally in the United States at the time she left for Thailand and was able to return only by misrepresenting her status. The Court of Appeals reversed, holding that the BIA had placed too much emphasis on respondent's illegal presence prior to her departure and on the increased risk of deportation that her departure had engendered, and that an absence can be "meaningfully interruptive" only when it increases the risk and reduces the hardship of deportation.

Held: Respondent did not meet § 244(a)(1)'s "continuous physical presence" requirement. Pp. 189–196.

(a) The Court of Appeals' interpretation of this requirement departs from the Act's plain meaning. Section 244(a)(1)'s language requiring certain threshold criteria to be met before the Attorney General, in his discretion, may suspend deportation plainly narrows the class of aliens who may obtain suspension. The ordinary meaning of such language does not readily admit any exception to the "continuous physical presence" requirement. When Congress has intended that a "continuous physical presence" requirement be flexibly administered, it has provided authority for doing so. Moreover, the evolution of the deportation provision itself shows that Congress knew how to distinguish between actual "continuous physical presence" and some irreducible minimum of "nonintermittent" presence. Pp. 189–192.

(b) Since this case deals with a threshold requirement added to the statute specifically to limit the discretionary availability of the deportation suspension remedy, a flexible approach to statutory construction, such as the Court of Appeals' approach, is not consistent with the congressional purpose underlying the "continuous physical presence" requirement. *Rosenberg* v. *Fleuti*, 374 U. S. 449, distinguished. Pp. 192–194.

(c) To interpret § 244(a)(1) as the Court of Appeals did collapses the section's "continuous physical presence" requirement into its "extreme hardship" requirement and reads the former out of the Act. Section 244(a)(1)'s language and history suggest that the two requirements are separate preconditions for a suspension of deportation. It is also clear that Congress intended strict threshold criteria to be met before the Attorney General could exercise his discretion to suspend deportation. To construe the Act so as to broaden such discretion is fundamentally inconsistent with this intent. Pp. 195–196.

673 F. 2d 1013, reversed.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 196.

Elliott Schulder argued the cause for petitioner. With him on the briefs were *Solicitor General Lee, Assistant Attorney General Jensen*, and *Deputy Solicitor General Geller*.

Bert D. Greenberg argued the cause for respondent. With him on the brief was *Martin Simone*.*

**James J. Orlow* filed a brief for the American Immigration Lawyers Association as *amicus curiae*.

JUSTICE O'CONNOR delivered the opinion of the Court.

In § 244(a)(1) of the Immigration and Nationality Act (Act), 66 Stat. 214, as amended, 8 U. S. C. § 1254(a)(1), Congress provided that the Attorney General in his discretion may suspend deportation and adjust the status of an otherwise deportable alien who (1) "has been physically present in the United States for a continuous period of not less than seven years"; (2) "is a person of good moral character"; and (3) is "a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child . . . ." In this case we must decide the meaning of § 244(a)(1)'s "continuous physical presence" requirement.

I

Respondent, a native and citizen of Thailand, first entered the United States as a nonimmigrant student in October 1969. Respondent's husband, also a native and citizen of Thailand, entered the country in August 1968. Respondent and her husband were authorized to remain in the United States until July 1971. However, when their visas expired, they chose to stay without securing permission from the immigration authorities.

In January 1977, petitioner, the Immigration and Naturalization Service (INS),[1] commenced deportation proceedings against respondent and her husband pursuant to § 241(a)(2) of the Act. See 8 U. S. C. § 1251(a)(2). Respondent and her husband conceded deportability and applied for suspension pursuant to § 244(a)(1). 8 U. S. C. § 1254(a)(1). An Immigration Judge found that respondent's husband had satisfied § 244(a)(1)'s eligibility requirements and suspended his deportation. App. to Pet. for Cert. 29a–31a. But respondent's own testimony showed that she had left the country during January 1974, and that she had improperly obtained a nonimmigrant visa from the United States consular officer in Thailand to aid her reentry three months later.[2] On the basis of this evidence, the Immigration Judge concluded that respondent had failed to meet the 7-year "continuous physical presence" requirement of the Act:

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[1] The Attorney General is authorized to delegate his powers under the Act. 8 U. S. C. § 1103. Accordingly, 8 CFR § 2.1 (1983) delegates the Attorney General's power to the Commissioner of Immigration and Naturalization, and permits the Commissioner to redelegate his authority through appropriate regulations. The Commissioner has delegated the power to consider § 244 applications to special inquiry officers, whose decisions are subject to review by the Board of Immigration Appeals (BIA), 8 CFR §§ 242.8, 242.21 (1983).

> "[Respondent's] absence was not brief, innocent, or casual. The absence would have been longer than three months if she had not obtained the spouse of a student visa as fast as she did obtain it. It was not casual because she had to obtain a new Tha[i] passport, as well as a nonimmigrant visa from the American Consul, to return to the United States. It was not innocent because she failed to inform the American Consul that she was the wife of a student who had been out of status for three years (and therefore not entitled to the nonimmigrant visa she received)." *Id.*, at 28a.

Accordingly, he denied respondent's application for suspension. *Id.*, at 28a–29a.

The Board of Immigration Appeals (BIA) affirmed the Immigration Judge's decision on the "continuous physical presence" issue.[3] BIA observed that respondent was illegally in the United States at the time she left for Thailand and that she was able to return only by misrepresenting her status as the wife of a foreign student. *Id.*, at 17a–18a. Based on these observations, BIA concluded that respondent's absence was meaningfully interruptive of her continuous physical presence in the United States. *Ibid.*

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[2] App. 17–24. About one month prior to her departure, respondent obtained a new Thai passport. *Id.*, at 21–22. However, when she departed for Thailand, respondent did not have a nonimmigrant visa allowing her to reenter this country. After her arrival in Thailand, respondent went to the United States Consul and obtained a nonimmigrant visa as the wife of a foreign student. Although respondent was aware that her husband's student visa had expired more than two years earlier, she failed to inform the consular officer of that fact. *Id.*, at 23–24.

The Court of Appeals reversed. 673 F. 2d 1013 (CA9 1981). It noted that, although respondent traveled to Thailand for three months, "she intended, at all times, to return to the United States." *Id.*, at 1017. The court held that BIA had placed too much emphasis on respondent's illegal presence prior to her departure and on the increased risk of deportation that her departure had engendered. *Id.*, at 1017–1018. Finding BIA's approach legally erroneous, it concluded that

> "an absence cannot be 'meaningfully interruptive' if two factors are present: (1) the hardships would be as severe if the absence had not occurred, and (2) there would not be an increase in the risk of deportation as a result of the absence." *Id.*, at 1018, and n. 6 (citing *Kamheangpatiyooth* v. *INS*, 597 F. 2d 1253, 1257 (CA9 1979)).

Since BIA failed "to view the circumstances in their totality, and analyze those circumstances in light of the [underlying] Congressional purpose," 673 F. 2d, at 1017,[4] the court remanded for further proceedings on the "continuous physical presence" issue.[5]

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[3] BIA reversed the Immigration Judge's decision that respondent's false testimony at her deportation hearing did not bar her from establishing her good moral character. App. to Pet. for Cert. 18a–19a. BIA also reversed the Immigration Judge's conclusion that respondent's husband was eligible for suspension of deportation, ruling that he had failed to establish extreme hardship either to himself or his epileptic daughter, *id.*, at 19a–21a.

[4] The "totality of the circumstances" approach was first articulated in *Kamheangpatiyooth*, which reaffirmed the Court of Appeals' earlier ruling in *Wadman* v. *INS*, 329 F. 2d 812 (CA9 1964). See 597 F. 2d, at 1256. *Wadman* held that the principles established by this Court in *Rosenberg*

We granted certiorari, 459 U. S. 965 (1982), to review the meaning of § 244(a)(1)'s requirement that an otherwise deportable alien have been "physically present in the United States for a continuous period of not less than seven years . . . ." 8 U. S. C. § 1254(a)(1). We find that the Court of Appeals' interpretation of this statutory requirement departs from the plain meaning of the Act.[6]

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v. *Fleuti*, 374 U. S. 449 (1963) (interpreting whether a lawful resident alien had made an "entry" within the meaning of 8 U. S. C. § 1101(a)(13)), should also guide the determination whether an intervening absence interrupts the continuity of physical presence for purposes of § 244(a)(1). 329 F. 2d, at 816. *Kamheangpatiyooth* concluded, however, that the principles enunciated in *Fleuti* were only "evidentiary" on the issue of whether a lawful resident's departure meaningfully interrupts his continuous physical presence under § 244(a)(1). 597 F. 2d, at 1257.

[5] The Court of Appeals also overturned BIA's finding that respondent was not of good moral character, and remanded for reconsideration of that issue. 673 F. 2d, at 1018–1020. In addition, it reversed BIA's finding that respondent's husband had failed to prove that extreme hardship would result from his deportation. *Id.*, at 1016–1017. Petitioner questions both rulings, but did not seek certiorari review of them. See Brief for Petitioner 8, and n. 5. We accordingly express no opinion on these issues.

[6] Respondent contends that the case is moot. Brief for Respondent 1–6. She asserts that since her return from Thailand in April 1974, she has been physically present in the United States for a continuous period of more than seven years. Accordingly, respondent claims that even if the Court were to reverse she could obtain suspension of deportation.

Respondent's mootness argument is without merit. Although respondent has filed a motion with BIA asking that her deportation proceeding be reopened, granting of the motion is entirely within BIA's discretion. See 8 CFR § 3.2 (1983); *INS* v. *Jong Ha Wang*, 450 U. S. 139, 143–144, and n. 5 (1981). Moreover, even if BIA does reopen the proceeding, there is no basis in the present record for concluding that BIA will determine that respondent is eligible for suspension of deportation. Counsel's unsupported assertions in respondent's brief do not establish that respondent could satisfy the "continuous physical presence" requirement. In short, we have no basis for concluding that the case is or will become moot.

II

This Court has noted on numerous occasions that "in all cases involving statutory construction, 'our starting point must be the language employed by Congress,' . . . and we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'" *American Tobacco Co.* v. *Patterson*, 456 U. S. 63, 68 (1982), quoting *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 337 (1979), and *Richards* v. *United States*, 369 U. S. 1, 9 (1962). The language of § 244(a)(1) requires certain threshold criteria to be met before the Attorney General or his delegates, in their discretion, may suspend proceedings against an otherwise deportable alien. This language plainly narrows the class of aliens who may obtain suspension by requiring each applicant for such extraordinary relief to prove that he

> "has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, . . . that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence . . . ." 8 U. S. C. § 1254(a)(1).

The ordinary meaning of these words does not readily admit any "exception[s] to the requirement of seven years of 'continuous physica[l] presence' in the United States to be eligible for suspension of deportation." *McColvin* v. *INS*, 648 F. 2d 935, 937 (CA4 1981).

By contrast, when Congress in the past has intended for a "continuous physical presence" requirement to be flexibly administered, it has provided the authority for doing so. For example, former § 301(b) of the Act, which required two years of "continuou[s] physica[l] presen[ce]" for maintenance of status as a United States national or citizen, provided that "absence from the United States of less than sixty days in the aggregate during the period for which continuous physical presence in the United States is required shall not break the continuity of such physical presence." 86 Stat. 1289, repealing 71 Stat. 644 (12-month aggregate absence does not break continuity of physical presence). The deliberate omission of a similar moderating provision in §244(a)(1) compels the conclusion that Congress meant this "continuous physical presence" requirement to be administered as written.

Indeed, the evolution of the deportation provision itself shows that Congress knew how to distinguish between actual "continuous physical presence" and some irreducible minimum of "nonintermittent" presence. Prior to 1940, the Attorney General had no discretion in ordering deportation, and an alien's sole remedy was to obtain a private bill from Congress. See *INS* v. *Jong Ha Wang*, 450 U. S. 139, 140, and n. 1 (1981). In 1940, Congress authorized the Attorney General to suspend deportation of aliens of good moral character whose deportation "would result in serious economic detriment" to the aliens or their families. See 54 Stat. 672. Then, in 1948, Congress amended the statute again to make the suspension process available to aliens who "resided continuously in the United States for seven years or more" and who could show good moral character for the preceding five years, regardless of family ties. 62 Stat. 1206. Finally, in 1952, "in an attempt to discontinue lax practices and discourage abuses," Congress replaced the 7-year "continuous residence" requirement with the current 7-year "continuous physical presence" requirement. H. R. Rep. No. 1365, 82d Cong., 2d Sess., 31 (1952). It made the criteria for suspension of deportation more stringent both to restrict the opportunity for discretionary action, see *ibid.*, and to exclude

> "aliens [who] are deliberately flouting our immigration laws by the processes of gaining admission into the

> United States illegally or ostensibly as nonimmigrants but with the intention of establishing themselves in a situation in which they may subsequently have access to some administrative remedy to adjust their status to that of permanent residents." S. Rep. No. 1137, 82d Cong., 2d Sess., pt. 1, p. 25 (1952).[7]

Had Congress been concerned only with "nonintermittent" presence or with the mere maintenance of a domicile or general abode, it could have retained the "continuous residence" requirement. Instead, Congress expressly opted for the 7-year "continuous physical presence" requirement.

The statutory switch from "continuous residence" to "continuous physical presence" was no simple accident of draftsmanship. Congress broadened the class of aliens eligible for admission to citizenship by requiring only five years' "continuous residence" and "physical presence" for at least half the period of residency. Concomitantly, it made § 244(a)(1) more restrictive; suspensions of deportations are "grossly unfair to aliens who await abroad their turn on quota waiting lists,"[8] and Congress wanted to limit the number of aliens allowed to remain through discretionary action.[9] The citi-

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[7] See also S. Rep. No. 1515, 81st Cong., 2d Sess., 602 (1950) (criticism of the administrative interpretation of the 7-year residence provision).

[8] H. R. Rep. No. 1365, 82d Cong., 2d Sess., 63 (1952).

[9] The 1952 Act also required an alien to show "exceptional and extremely unusual hardship" to qualify for suspension of deportation. 66 Stat. 214. In 1962, Congress amended § 244(a)(1) to require that the alien show deportation would result in "extreme hardship." 76 Stat. 1248. It retained the literal "continuous physical presence" requirement word-for-word, although it added an express exception in § 244(b) for aliens who had served at least 24 months' active service in the Armed Forces.

JUSTICE BRENNAN cites various statements, especially those of Senator Keating, in the legislative history of the 1962 amendments to support his belief that the Act should not be literally interpreted. See *post*, at 199–205. These statements, of course, relate not to the "continuous physical presence" requirement, which Congress retained as a strict condition precedent to deportation suspension, but to the "extreme hardship" requirement. As Senator Keating himself explained: "Section 244 as amended would zenship and suspension-of-deportation provisions are interrelated parts of Congress' comprehensive scheme for admitting aliens into this country. We do justice to this scheme only by applying the "plain meaning of [§ 244(a)(1)], however severe the consequences." *Jay* v. *Boyd*, 351 U. S. 345, 357 (1956). The Court of Appeals' inquiry into whether the hardship to be suffered upon deportation has been diminished by the alien's absence fails to do so.

III

Respondent contends that we should approve the Court of Appeals' "generous" and "liberal" construction of the "continuous physical presence" requirement notwithstanding the statute's plain language and history. Brief for Respondent 10 (quoting *Kamheangpatiyooth* v. *INS*, 597 F. 2d, at 1256, and n. 3). She argues that the Court of Appeals' construction is in keeping both with our decision in *Rosenberg* v. *Fleuti*, 374 U. S. 449 (1963), and with the equitable and ameliorative nature of the suspension remedy. We disagree.

A

In *Fleuti*, this Court held that a lawful permanent resident alien's return to the United States after an afternoon trip to Mexico did not constitute an "entry" within the meaning of § 101(a)(13) of the Act.[10] We construed the term "intended"

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permit aliens who have been physically present in the United States for 7 years, or, in more serious cases, for 10 years, to apply to the Attorney General for a suspension of deportation as under present section 244. The alien would have to show a specified degree of hardship . . . . The conference version of section 244 . . . has continuing future applicability to any alien who can satisfy either the 7- or the 10-year physical presence requirement in addition to the other criteria for suspension of deportation." 108 Cong. Rec. 23448–23449 (1962).

[10] 8 U. S. C. § 1101(a)(13). That provision defines an "entry" as "any coming of an alien into the United States . . . except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his

in the statutory exception to the definition of "entry" to mean an "intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence." *Id.*, at 462. We interpreted the statute not to allow a lawful resident alien like Fleuti to be excluded "for a condition for which he could not have been deported had he remained in the country," *id.*, at 460, because it would subject the alien to "unsuspected risks and unintended consequences of . . . wholly innocent action." *Id.*, at 462. Since Fleuti had gone to Mexico, without travel documents, for only a few hours, we remanded for a determination whether his departure had been "innocent, casual, and brief," and so not "meaningfully interruptive" of his permanent residence. *Id.*, at 461, 462.

Fleuti is essentially irrelevant to the adjudication of respondent's § 244(a)(1) suspension application. *Fleuti* dealt with a statutory exception enacted precisely to ameliorate the harsh effects of prior judicial construction of the "entry" doctrine. See *id.*, at 457–462. By contrast, this case deals with a threshold requirement added to the statute specifically to limit the discretionary availability of the suspension remedy. See *supra*, at 190–191. Thus, whereas a flexible approach to statutory construction was consistent with the congressional purpose underlying § 101(a)(13), such an approach would not be consistent with the congressional purpose underlying the "continuous physical presence" requirement. *Ibid.*

In *Fleuti*, the Court believed that Congress had not considered the "meaningless and irrational hazards" that a strict application of the "entry" provision could create. Thus, it inferred that Congress would not have approved of the other-

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departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him . . . ."

The question of an "entry" may properly be determined in an exclusion, as well as a deportation, hearing. See *Landon* v. *Plasencia*, 459 U. S. 21 (1982).

wise harsh consequences that would have resulted to Fleuti. See 374 U. S., at 460–462. Here, by contrast, we have every reason to believe that Congress considered the harsh consequences of its actions. Congress expressly provided a mechanism for factoring "extreme hardship" into suspension of deportation decisions. We would have to ignore the clear congressional mandate and the plain meaning of the statute to find that *Fleuti* is applicable to the determination whether an otherwise deportable alien has been "physically present in the United States for a continuous period of not less than seven years . . . ." 8 U. S. C. § 1254(a)(1).[11] We refuse to do so.

We also note, though it is not essential to our decision, that *Fleuti* involved the departure of a *lawful* resident alien who, but for his departure, otherwise had a statutory right to remain in this country. This case, by contrast, deals with the departure of an *unlawful* alien who could have been deported even had she remained in this country. Such an alien has no basis for expecting the Government to permit her to remain in the United States or to readmit her upon her return from foreign soil. Thus, respondent simply is not being excluded "for a condition for which [she] could not have been deported had [she] remained in the country . . . ." 374 U. S., at 460.[12]

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[11] In *INS* v. *Jong Ha Wang*, this Court observed that a narrow interpretation of the term "extreme hardship" was "consistent with the 'extreme hardship' language, which itself indicates the exceptional nature of the suspension remedy." 450 U. S., at 145. Similarly, we find only the plain meaning of the "continuous physical presence" requirement to be consistent with the exceptional nature of the suspension remedy.

[12] The other Courts of Appeals, even though uncertain about *Fleuti*'s application to § 244(a)(1), have routinely rejected suspension of deportation applications of unlawful aliens who literally have not been physically present in the United States for a continuous period of seven years. See, *e. g., Fidalgo/Velez* v. *INS*, 697 F. 2d 1026 (CA11 1983); *McColvin* v. *INS*, 648 F. 2d 935 (CA4 1981); *Heitland* v. *INS*, 551 F. 2d 495 (CA2), cert. denied, 434 U. S. 819 (1977).

B

Respondent further suggests that we approve the Court of Appeals' articulation of the "continuous physical presence" standard—that an absence is "meaningfully interruptive" only when it increases the risk and reduces the hardship of deportation—as consistent with the ameliorative purpose of, and the discretion of the Attorney General to grant, the suspension remedy. Brief for Respondent 6–11. Respondent's suggestion is without merit.

Although § 244(a)(1) serves a remedial purpose, the liberal interpretation respondent suggests would collapse § 244 (a)(1)'s "continuous physical presence" requirement into its "extreme hardship" requirement and read the former out of the Act. The language and history of that section suggest that "continuous physical presence" and "extreme hardship" are separate preconditions for a suspension of deportation. See n. 9, *supra*. It strains the statutory language to construe the "continuous physical presence" requirement as requiring yet a further assessment of hardship.

It is also clear that Congress intended strict threshold criteria to be met before the Attorney General could exercise his discretion to suspend deportation proceedings. Congress drafted § 244(a)(1)'s provisions specifically to restrict the opportunity for discretionary administrative action. Respondent's suggestion that we construe the Act to broaden the Attorney General's discretion is fundamentally inconsistent with this intent. In *INS* v. *Jong Ha Wang*, we rejected a relaxed standard for evaluating the "extreme hardship" requirement as impermissibly shifting discretionary authority from INS to the courts. 450 U. S., at 146. Respondent's suggestion that we construe the Act to broaden the Attorney General's discretion analogously would shift authority to relax the "continuous physical presence" requirement from Congress to INS and, eventually, as is evident from the experience in this case, to the courts. We must therefore reject respondent's suggestion as impermissible in our tripartite scheme of government.[13] Congress designs the immigration laws, and it is up to Congress to temper the laws' rigidity if it so desires.

IV

The Court of Appeals' approach ignores the plain meaning of § 244(a)(1) and extends eligibility to aliens whom Congress clearly did not intend to be eligible for suspension of deportation. Congress meant what it said: otherwise deportable aliens must show that they have been physically present in the United States for a continuous period of seven years before they are eligible for suspension of deportation. The judgment of the Court of Appeals therefore is

Reversed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, concurring in the judgment.

The Court today holds that an unexplained 3-month absence from the United States disqualifies an alien from eligibility for relief from deportation under § 244(a)(1) of the Immigration and Nationality Act (Act), 8 U. S. C. § 1254(a)(1), *ante*, this page, and further, that our decision in *Rosenberg* v. *Fleuti*, 374 U. S. 449 (1963), is essentially irrelevant in the § 244(a)(1) context, *ante*, at 192–194. I agree with both of these conclusions. In the process of reaching them, however, the Court seems to imply that Congress intended the term "continuous" in the phrase "physically present . . . for a continuous period" to be interpreted literally, *ante*, at 189, 195–196. If that is what the Court implies, the status of temporary absences far different from the one at issue in this case—for example, a short vacation in Mexico, see *Wadman* v. *INS*, 329 F. 2d 812 (CA9 1964), an inadvertent train ride through Canada while en route from Buffalo to Detroit, see *Di Pasquale* v. *Karnuth*, 158 F. 2d 878 (CA2 1947), a trip to one's native country to tend to an ailing parent, or some other type of temporary absence that has no meaningful bearing on the attachment or commitment an alien has to this country—would presumably be treated no differently from the absence at issue today. Because such absences need not be addressed to decide this case, and, in any event, because I believe that Congress did not intend the continuous-physical-presence requirement to be read literally, I part company with the Court insofar as a contrary interpretation may be implied.

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[13] The Solicitor General admits that prior to "the Ninth Circuit's decision in 1964 in *Wadman* v. *INS*, 329 F. 2d 812, the lower courts and the Board of Immigration Appeals generally applied a strict, literal interpretation of the 'continuous physical presence' language in Section 244(a)(1) and held ineligible for suspension of deportation any alien who was absent from the United States during the seven year period, without regard to the circumstances surrounding the absence." Brief for Petitioner 11–12 (citing cases). Our decision today frees INS from the strictures of *Wadman* and interprets the language as Congress has written it. Contrary to JUSTICE BRENNAN's suggestion, see *post*, at 197, neither we nor INS have authority to create "'room for flexibility in applying'" § 244(a)(1) when the language chosen by Congress and its purpose are otherwise.

I

In this case, the Immigration and Naturalization Service (INS) argues that the Court of Appeals has taken too liberal a view of the continuous-physical-presence requirement. It does not argue, however, that the requirement should be interpreted literally; nor does it brief the question whether literally continuous, physical presence should be a prerequisite to suspension of deportation. Indeed, at oral argument, counsel for the INS stated that "the [INS] believes that there is room for flexibility in applying [§ 244(a)(1)]." Tr. of Oral Arg. 8.[1] In light of this express position of the INS, the agency charged with responsibility for administering the immigration laws, as well as the fact that respondent's unexplained 3-month absence from the United States plainly disqualifies her for relief under any reasonable interpretation of § 244(a)(1), I would not address, by implication or otherwise, the question whether the continuous-physical-presence requirement was meant to be interpreted literally.

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[1] Since at least 1967, the INS has interpreted the continuous-physical-presence requirement flexibly. *Matter of Wong*, 12 I. & N. Dec. 271 (1967). Prior to 1967, the INS had purported to adopt a literal interpretation but had declined to apply that interpretation consistently. See n. 3, *infra*.

II

Moreover, if we are to understand that the Court implicitly approves of a literal interpretation of the statute, the error of its analysis is patent. It is a hornbook proposition that "[a]ll laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter." *United States* v. *Kirby*, 7 Wall. 482, 486–487 (1869). See also *Helvering* v. *Hammel*, 311 U. S. 504, 510 (1941); *United States* v. *Katz*, 271 U. S. 354, 362 (1926). In a case such as this, in which a literal interpretation of a statutory provision may indeed lead to absurd consequences, *supra*, at 197, we must look beyond the terms of the provision to the underlying congressional intent. And in this case, the legislative history of § 244, far from compelling a wooden interpretation of the statutory language, in fact indicates that Congress intended the continuous-physical-presence requirement to be interpreted flexibly.

The Court suggests a contrary conclusion based on two factors: First, the fact that Congress enacted the continuous-physical-presence requirement in 1952 in response to abuses of the more lenient "residence" requirement, which had been in effect since 1948; and second, the fact that former § 301(b) of the Act, which imposed a 2-year continuous-physical-presence requirement upon foreign-born citizens seeking to avoid the loss of their citizenship, explicitly provided that "absence from the United States of less than sixty days . . . shall not break the continuity of such physical presence." *Ante*, at 189–191. But plainly, neither of these aspects of the Act's legislative history sheds meaningful light on the issue of whether the term "continuous" should be interpreted literally. It is true, of course, that Congress replaced the "residence" requirement with the continuous-physical-presence requirement in order to prevent abuses, as the Court states, *ante*, at 190–191, but the abuses identified by Congress are hardly in the nature of a vacation in Mexico, a train ride through Canada, or other similar absences that would defeat eligibility for relief under a literal reading of § 244(a)(1). Instead, Congress sought to prevent much more substantial abuses, such as a situation described in the Senate Report on the Act, in which an alien "has a total of 7 years' residence in the United States [but] the alien has been out of the United States for as long as 2 years during the last 7 years." S. Rep. No. 1515, 81st Cong., 2d Sess., 602 (1950). Furthermore, although it is true that the 60-day leeway allowed under § 301(b) for foreign-born citizens has no counterpart in § 244(a)(1), this only indicates that Congress was unwilling to provide such generous and unrestricted leeway to aliens seeking suspension of deportation. It surely does not indicate that Congress intended *every* type of absence—however innocent or brief—to defeat an alien's eligibility for relief. Finally, as the Court implicitly acknowledges, there is no direct statement in the legislative history of the 1952 Act to indicate that Congress intended to have the term "continuous" interpreted literally. It follows, then, that there is simply no support for giving § 244(a)(1) a literal interpretation.

Indeed, there is direct support for precisely the opposite conclusion in the legislative history of the 1962 amendments to the Act, in which Congress rewrote § 244. The current version of § 244, which barely resembles the original 1952 provision but which retains the continuous-physical-presence requirement, was enacted as part of those amendments.[2] It is the congressional intent underlying the 1962 amendments, therefore, that is central to the question whether Congress meant to have the continuous-physical-presence requirement applied literally. And the legislative history of those amendments, whether viewed as reflecting the 1952 congressional understanding of the continuous-physical-presence requirement, or as establishing a new understanding in the 1962 revision, reveals an express congressional intent to have the term "continuous" interpreted more flexibly than a literal definition of the term would imply. Moreover, prior to the 1962 amendments, the only Court of Appeals that had occasion to interpret the continuous-physical-presence requirement held that the term "continuous" was not intended to be interpreted literally. *McLeod* v. *Peterson*, 283 F. 2d 180 (CA3 1960). In that case, the court reversed a decision of the INS, holding that an 8-month absence from the United States "does not interrupt the continuity of . . . presence in the United States within the meaning of [§ 244]," under circumstances in which the INS had induced the alien to leave the country without the authority to do so. *Id.*, at 187. In explaining its decision, the court stated that § 244 had "sufficient flexibility to permit a rational effecting of the congressional intent." *Ibid.* Of course, when Congress enacts a new law that incorporates language of a pre-existing law, Congress may be presumed to have knowledge of prior judicial interpretations of the language and to have adopted that interpretation for purposes of the new law. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 382, n. 66 (1982); *Lorillard* v. *Pons*, 434 U. S. 575, 580–581 (1978). Therefore, even in the absence of explicit indications of legislative intent, we would be justified in concluding that Congress intended to have the continuous-physical-presence requirement interpreted flexibly.[3]

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[2] Major commentators in this field have referred to the 1962 amendments as a "drasti[c] revis[ion]" of § 244. 2 C. Gordon & H. Rosenfield, Immigration Law and Procedure § 7.9a (1983).

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[3] Prior to the 1962 amendments, the INS generally purported to interpret the continuous-physical-presence requirement literally, but on at least one occasion, the agency expressly declined to follow through with the lit-

In any event, there are explicit indications in the legislative history of the 1962 amendments that Congress did not intend to enact a literal continuous-physical-presence requirement. The 1962 amendments originated as S. 3361. As introduced, the bill contained a provision that would have amended § 249 of the Immigration and Nationality Act. Section 249, which originated in 1929, allows the Attorney General to confer permanent-residence status upon an alien who meets certain qualifications, such as "good moral character," and establishes that he or she has *resided* in the United States since a statutorily provided date. S. 3361, 87th Cong., 2d Sess., § 4 (1962). At the time of the 1962 amendments, the operative date was June 28, 1940, and S. 3361, as introduced, would have moved that date up to December 24, 1952. Under the Senate bill, therefore, relief from deportation would have been available to an alien who simply established "residence" since 1952, without regard to whether his or her physical presence in this country was literally continuous. The House, however, declined to amend § 249. Instead, the House sent to the Conference Committee a bill that differed from the Senate bill in that it left June 28, 1940, as the operative date of entry for relief under that section. 108 Cong. Rec. 22608–22609 (1962). The Conference Committee, however, compromised between the House and Senate versions of the bill by adopting an amendment to § 244, instead of an amendment to § 249. And it is that compromise that became the current version of § 244.[4]

Basically, the new § 244 differed from the 1952 version in two respects. First, it compressed a complicated system, in which eligible aliens had to meet one of five different sets

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eral approach. *Matter of J—— M—— D——*, 7 I. & N. Dec. 105 (1956). In explanation, the INS stated that "a statute should be construed so as to carry out the intent of the legislature, although such construction may seem contrary to the letter of the statute." *Id.*, at 107.

[4] The June 28, 1940, date was left unchanged by the Conference Committee bill.

of requirements for relief, depending on the cause of their deportability, into a simple two-category system based essentially on the severity of the reason giving rise to deportability. For example, under the 1962 provision, aliens who are deportable for less severe offenses have to meet a 7-year continuous-physical-presence requirement, see 8 U. S. C. § 1254(a)(1), and those who are deportable for more severe offenses have to meet a 10-year continuous-physical-presence requirement. See § 1254(a)(2). Second, the new § 244 modified the hardship requirement for aliens who committed less severe offenses from one of "exceptional and extremely unusual hardship" to one of "extreme hardship."

In explaining the intent of the conferees, the Conference Report stated that "[t]he now proposed language is designed to achieve the purpose envisaged by the Senate in a modified manner." H. R. Conf. Rep. No. 2552, 87th Cong., 2d Sess., 4 (1962).[5] That is to say, § 244, as revised, was intended to extend relief from deportation to aliens residing in the United States since 1952, at the earliest. The Report then went on to explain that by revising § 244, rather than § 249, this liberalization of relief would be constrained by two factors that were already built into the first, but not the second, provision. Those factors were, first, a requirement that the Attorney General find that deportation would result in personal hardship before granting relief, and, second, a requirement that all grants of relief be subject to congressional review.

When the Conference Committee's compromise was reported on the House floor, one manager stated that "we largely restore title 3 of the Smith Act of 1940 . . . as the guide for the purpose of making a determination of eligibility and obtaining the approval of the Congress for the ruling of the Attorney General," 108 Cong. Rec. 23421 (1962) (statement of Rep. Walter), and another simply restated the Conference Report's emphasis on the congressional-review and personal-hardship provisions of the Conference bill, *id.*, at 23423 (statement of Rep. Feighan). The reference to the Smith Act, formally titled the Alien Registration Act of 1940, is particularly significant because that statute, which contained the original suspension-of-deportation remedy, did not impose a continuous-physical-presence requirement. 54 Stat. 672.[6] Under the Smith Act, residence in the United States provided a sufficient basis for the Attorney General to grant suspension of deportation. It is difficult to see, therefore, how this history suggests that the House intended to impose a literal continuous-physical-presence requirement.

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[5] Accord, 2 C. Gordon & H. Rosenfield, *supra* n. 2.

Similarly, various statements made by Senators debating the Conference Committee's version of the bill belie the presence of any intent to impose a strict continuous-physical-presence requirement as a prerequisite to relief. For instance, one of the managers of the bill on the Senate floor, Senator Keating, stated that "[n]o person who would have been eligible for administrative relief under section 249 as the Senate proposed and amended it, would be excluded from consideration for relief under section 244 as the conference report now proposes to amend it." 108 Cong. Rec. 23448 (1962). As pointed out above, under the Senate's original proposal, § 249 would have covered aliens who *resided* in the United States since December 24, 1952, regardless of whether their residence amounted to a "continuous physical presence." Senator Keating, therefore, was clearly stating that such aliens would be eligible for suspension of deportation under § 244 as rewritten by the Conference Committee, even though some of them undoubtedly had left the country temporarily during their period of residency here. Accordingly, unless we are willing to decide that the explanation of the statute provided by one of its principal sponsors was, for some reason, flatly wrong, we cannot conclude that the continuous-physical-presence requirement, as enacted in 1962, was intended to be interpreted literally.[7]

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[6] Actually, it was Title 2, not Title 3, of that Act that authorized the suspension of deportation. Title 3 had nothing to do with relief from deportation of any kind. I must assume, therefore, that the reference to "Title 3" was a misstatement.

To be sure, we gain only limited insight into congressional intent from statements made during floor debate and from conference reports, but we have always relied heavily upon authoritative statements by proponents of bills in our search for the meaning of legislation. *Lewis* v. *United States*, 445 U. S. 55, 63 (1980); *FEA* v. *Algonquin SNG, Inc.*, 426 U. S. 548, 564 (1976). Of necessity, this is particularly true where, as here, a provision was introduced into a bill by a conference committee. The remarks of Senator Keating and the House managers, therefore, plainly illuminate Congress' intent to achieve largely what an updating of § 249 would have achieved, except that the Attorney General was to be constrained by a personal-hardship requirement and congressional review.

It seems inescapable, therefore, that Congress did not intend to have the continuous-physical-presence requirement interpreted literally. Instead, under a proper construction of § 244(a)(1), the INS should remain free to apply the requirement flexibly, unconstrained by any limitation *Rosenberg* v.

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[7] In light of the language that Congress enacted in 1962 and the historical development of that language, see *ante*, at 190–191, we would have to conclude that Senator Keating's rhetoric was somewhat inaccurate to the extent that it implies that continuous physical presence means residence. This inaccuracy, however, does not detract from the basic point that Congress was not thinking in literal terms when it enacted § 244. If Congress did intend the term "continuous" to be interpreted literally, surely Senator Keating would not have been able to make the statement he made in support of the bill, at least not without some rejoinder.

In support of its interpretation, the Court inexplicably points to another sentence of Senator Keating's remarks in which he used the term "physically present." *Ante*, at 191–192, n. 9. In that statement, the Senator did not, of course, define the meaning of those words—the issue in this case—or even employ the entire phrase with which we are concerned.

Fleuti, 374 U. S. 449 (1963), may have imposed. Indeed, in substance, this interpretation conforms with the position of the INS since at least 1967, see *Matter of Wong*, 12 I. & N. Dec. 271 (1967), and is apparently the position to which the agency continues to adhere. See *supra*, at 197, and n. 1.

III

Because the Court's opinion seems to interpret the Immigration and Nationality Act in a way that is not briefed by the parties, is unnecessary to decide this case, is contrary to the view of the agency with principal responsibility for administering the Act, is unsupported by the statute's legislative history, and would certainly produce unreasonable results never envisioned by Congress, I cannot join the Court's opinion, but concur only in the judgment.

COMMISSIONER OF INTERNAL REVENUE *v.* ENGLE ET UX.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 82–599. Argued October 11, 1983—Decided January 10, 1984*

In response both to the public outcry concerning the United States' growing dependence on foreign energy and to the alleged excessive profits that major integrated oil companies were earning, the Tax Reduction Act of 1975 repealed, as applied to the major integrated oil companies, the percentage depletion allowance authorized as a deduction from taxable income, but exempted independent producers and royalty owners from the repeal so as to encourage domestic production of oil and gas. The Act added § 613A to the Internal Revenue Code. That section provides that a percentage depletion allowance under § 611 for such independent producers and royalty owners shall be computed in accordance with § 613 "with respect to . . . so much of the taxpayer's average daily production of domestic crude oil as does not exceed the taxpayer's depletable oil quantity" and "depletable natural gas quantity." During 1975, respondents (husband and wife) in No. 82–599 assigned their oil and gas leases to third parties, while retaining overriding royalties. As partial consideration for these assignments, respondents received $7,600 in advance royalties. This constituted the entire income received from the property in 1975 since there was no oil and gas production that year. On their joint federal income tax return for 1975, respondents claimed a percentage depletion deduction equal to 22% of the advance royalties. The Commissioner of Internal Revenue disallowed the deduction because the advance royalties were not received "with respect to" any "average daily production" of oil or gas. The Tax Court upheld this determination, but the Court of Appeals reversed. In No. 82–774, petitioner joint owners leased their oil and gas interests in 1975 to various lessees. Under the leases petitioners were to receive both royalties from oil and gas produced and annual cash bonuses even if no oil or gas was produced. In 1976, oil and gas was discovered on the property and was produced in substantial amounts. Petitioners claimed depletion deductions on both the bonuses and the royalties received in that year.

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*Together with No. 82–774, *Farmar et al* v. *United States*, on certiorari to the Court of Claims.

The Commissioner disallowed the deduction on the bonuses, again because they were not received "with respect to" any "average daily production." After paying the resulting deficiencies, petitioners filed a suit for refund in the Court of Claims, which held for the Commissioner.

Held: Section 613A was not intended to deny the allowance for percentage depletion on advance royalty or lease bonus income altogether; rather, §§ 611–613A entitle taxpayers to such an allowance at some time during the productive life of the lease. Pp. 214–227.

(a) Any reasonable interpretation of § 613A must harmonize with the section's goal of subsidizing the combined efforts of small producers and royalty owners in the exploration and production of the Nation's oil and gas resources. The Commissioner's interpretation—under which taxpayers would receive percentage depletion on income derived from oil and gas interests only if the payment associated with that income could be attributed directly to specific units of production, and which anomalously suggests that a Congress intent on increasing domestic production by small producers included substantial economic disincentives in the same legislation—does not comport with this goal. By contrast, allowing percentage depletion on all qualified income makes available the maximum public subsidy that Congress was willing to provide. Pp. 217–220.

(b) The legislative history of § 613A discloses a clear congressional intent to retain the percentage depletion rules that existed in 1975, and under which taxpayers leasing their interests in mineral deposits were entitled to a percentage depletion on any bonus or advance royalty whether there was production of the underlying mineral or not. Pp. 220–223.

(c) When § 613A is considered together with related Code sections and in light of the legislative history, it is clear that Congress did not mean to withdraw the percentage depletion on lease bonuses or advance royalty income arising from oil and gas properties. Section 613A clearly provides that income attributable to production over a certain level will not be eligible for percentage depletion, but nothing in the statute bars such a depletion on income received prior to actual production. To the contrary, so long as the income can be attributed to production below the established ceilings, lease bonuses and royalty income come within the four corners of the percentage depletion provisions. Pp. 223–224.

(d) Since the Commissioner's interpretation is unreasonable, this Court will not defer to it. The Commissioner has not shown any "insurmountable" practical problems that would render his position more tenable. While § 613A's various production requirements and limitations make accurate calculation of percentage depletion allowances difficult in the absence of production figures, these problems can be resolved in a number of reasonable ways, as, for example, by requiring lessors to defer depletion deductions to years of actual production or to adjust deductions taken with amended returns. The Commissioner cannot resolve the practical problems by eliminating the allowances altogether. Pp. 224–227.

No. 82–599, 677 F. 2d 594, affirmed; No. 82–774, 231 Ct. Cl. 642, 689 F. 2d 1017, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and STEVENS, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, WHITE, and MARSHALL, JJ., joined, *post*, p. 228.

Carter G. Phillips argued the cause for petitioner in No. 82–599 and for the United States in No. 82–774. On the briefs were *Solicitor General Lee*, *Assistant Attorney General Archer*, *Stuart A. Smith*, and *Jonathan S. Cohen*.

Marvin K. Collie argued the cause for petitioners in No. 82–774. With him on the brief were *William M. Linden* and *James A. Carter*.

Thomas J. Donnelly argued the cause for respondents in No. 82–599. With him on the brief was *Michael J. Conlan*.

JUSTICE O'CONNOR delivered the opinion of the Court.

These consolidated cases present the question whether §§611–613A of the Internal Revenue Code (Code), 26 U. S. C. §§611–613A, entitle taxpayers to an allowance for percentage depletion on lease bonus or advance royalty income received from lessees of their oil and gas mineral interests.

I

A

Ever since enacting the earliest income tax laws, Congress has subsidized the development of our Nation's natural resources. Toward this end, Congress has allowed holders of economic interests in mineral deposits, including oil and gas wells, to deduct from their taxable incomes the larger of two depletion allowances: cost or percentage.[1] Under cost depletion, taxpayers amortize the cost of their wells over their total productive lives.[2] Under percentage depletion, taxpayers deduct a statutorily specified percentage of the "gross income" generated from the property, irrespective of actual costs incurred.[3] Through these depletion provisions, Congress has permitted taxpayers to recover the investments they have made in mineral deposits and to generate additional capital for further exploration and production of the Nation's mineral resources.

Taxpayers have historically preferred the allowance for percentage, as opposed to cost, depletion on wells that are good producers because the tax benefits are significantly greater. Prior to 1975, it was well settled that taxpayers leasing their interests in mineral deposits to others were entitled to percentage depletion on any bonus[4] or advance royalty[5] received, whether there was production of the underlying mineral or not. The bonus was regarded as "payment in advance for oil and gas to be extracted," *Herring* v. *Commissioner*, 293 U. S. 322, 324 (1934), and the advance royalty was considered a "return *pro tanto* of [the lessor's] capital investment in the oil in anticipation of its extraction . . . ." *Palmer* v. *Bender*, 287 U. S. 551, 559 (1933). Though the Commissioner of Internal Revenue had once argued that the allowance should not apply to such income,[6] this Court determined that both lease bonuses and advance royalties constituted "gross income from property" and accordingly were subject to percentage depletion. See *Herring* v. *Commissioner*, *supra*, at 327–328. The depletion was based on the income received from the property, and not, at least in the short run, on the production of the substance itself. 293 U. S., at 327–328.

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[1] Originally, Congress authorized only a cost depletion allowance. See 38 Stat. 172–173 (1913). However, in the Revenue Act of 1918, it amended the Code to allow taxpayers to calculate depletion based on the discovery value of their mineral deposits. See 40 Stat. 1067–1068. When discovery value depletion proved difficult to administer, Congress eliminated it in favor of the percentage depletion allowance. See 44 Stat. (part 2) 16 (1926).

For a detailed study of the history of percentage depletion, see Baker, The Nature of Depletable Income, 7 Tax L. Rev. 267 (1952).

[2] See 26 U. S. C. § 612. The annual cost depletion deduction generally is calculated by multiplying the cost of the mineral interest by the ratio of the units sold in a taxable year to the total estimated recoverable reserves. See 26 CFR § 1.611–2(a) (1983).

[3] See 26 U. S. C. § 613. Section 613(a) provides that "the allowance for depletion . . . shall be the percentage . . . of the gross income from the property excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 percent of the taxpayer's taxable income from the property (computed without allowance for depletion)."

[4] A lease bonus is "the cash consideration paid by the lessee for the execution of an oil and gas lease by a landowner. . . . Bonus is usually figured on a per acre basis." 8 H. Williams & C. Meyers, Oil and Gas Law 65 (1982).

Even under pre-1975 law, however, depletion deductions eventually had to be attributed to actual production. Lessors receiving bonus or advance royalty income without oil or gas being produced during the life of the lease have been required to recapture their depletion deductions and restore the previously deducted amounts to income. See *Douglas* v. *Commissioner*, 322 U. S. 275, 285 (1944). Furthermore, since only one percentage depletion allowance is statutorily authorized for each dollar of oil and gas income, lessees have always been required to reduce their allowances by any bonuses or advance royalties paid to lessors. See *Helvering* v. *Twin Bell Oil Syndicate,* 293 U. S. 312 (1934). Thus, prior to 1975, those who held economic interests in mineral deposits, large or small, were entitled to a single percentage depletion deduction for *all* income from the property, including lease bonus and advance royalty income, so long as oil or gas was eventually extracted from the land.

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[5] An advance royalty is simply a prepayment of the landowner's share of production, in kind or in value, free of the expenses of production. *Id.*, at 656–657.

[6] The Commissioner interpreted the pertinent section of the 1926 Code, which provided an allowance for percentage depletion only "[i]n the case of oil and gas wells," see 44 Stat. (part 2) 16, not to entitle taxpayers to percentage depletion in situations where no such well existed. Since a well does not technically exist prior to actual production, the Commissioner contended that the percentage depletion provision did not apply to lease bonus or advance royalty income, which by definition precedes production. The Commissioner would have allowed percentage depletion only if future production were practically assured, or in fact obtained, during the taxable year. See G. C. M. 11384, XII–1 Cum. Bull. 64 (1933), revoked by G. C. M. 14448, XIV–1 Cum. Bull. 98 (1935).

The 1970's, however, brought about an abrupt redirection in the Nation's energy policy. Escalating energy prices and the Arab oil embargo awakened the public to the Nation's growing reliance on foreign energy sources. Some thought the major integrated oil companies were reaping excessive oil and gas profits at the public's expense, while reinvesting little of their concomitant tax depletion subsidies in domestic energy production.[7] Congress responded to this public outcry by repealing the percentage depletion allowance as applied to the major integrated oil companies. See Tax Reduction Act of 1975, Pub. L. 94–12, 89 Stat. 26, 47–53. At the same time, however, it exempted independent producers and royalty owners from the repeal to encourage domestic production. In new § 613A, Congress provided that

> ". . . the allowance for depletion under section 611 shall be computed in accordance with section 613 with respect to—
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> "(A) so much of the taxpayer's average daily production of domestic crude oil as does not exceed the taxpayer's depletable oil quantity; and

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[7] See, *e. g.*, 121 Cong. Rec. 7239–7244 (1975) (statement of Sen. Hollings); *id.*, at 7244–7248 (statement of Sen. Ribicoff); *id.*, at 7267 (statement of Sen. Cranston); see generally Landis, The Impact of the Income Tax Laws on the Energy Crisis: Oil and Congress Don't Mix, 64 Calif. L. Rev. 1040, 1042–1048 (1976).

> "(B) so much of the taxpayer's average daily production of domestic natural gas as does not exceed the taxpayer's depletable natural gas quantity;
>
> "and the applicable percentage (determined in accordance with the table contained in paragraph (5)) shall be deemed to be specified in subsection (b) of section 613 for purposes of subsection (a) of that section." 26 U. S. C. § 613A(c)(1).[8]

Thus, beginning with tax year 1975, only taxpayers who met the terms of this new provision were eligible for the percentage depletion allowance.[9]

B

During 1975, Fred Engle and his wife assigned their two Wyoming oil and gas leases to third parties, retaining overriding royalties in each lease. As partial consideration for these assignments, the Engles received a total of $7,600 in advance royalties. This $7,600 constituted the entire income the Engles received from the property in 1975 since there was no oil and gas production that year. On their joint federal income tax return for 1975, the Engles claimed a percentage depletion deduction equal to 22% of the advance royalties received. The Commissioner disallowed the deduction because the advance royalties were not received "with respect to" any "average daily production" of oil or gas as, in his view, was required by the 1975 amendments to the Code.

The Tax Court, with one judge dissenting, upheld the Commissioner's determination. 76 T. C. 915 (1981). It agreed that new § 613A tied the oil and gas percentage depletion allowance to actual production and that the Engles' advance royalty receipts were not attributable to such production.[10] But the Court of Appeals for the Seventh Circuit reversed. 677 F. 2d 594 (1982). It found that Congress' motivation in retaining the percentage depletion allowance for "small producers"—namely, to subsidize domestic energy development—was equally applicable to advance royalties received by lessors. *Id.*, at 600. The Court of Appeals therefore held that, in light of this motivation and the Code's longstanding treatment of advance royalties, new § 613A should be interpreted to authorize a percentage depletion allowance on advance royalties received, so long as there eventually was production from the property. *Id.*, at 601–602.

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[8] Congress defined the taxpayer's "average daily production" of oil or gas to be the aggregate production from the property during the taxable year divided by the number of days in the taxable year. See 26 U. S. C. § 613A(c)(2)(A).

[9] In other paragraphs of new § 613A, Congress designated certain gradually decreasing rates and depletable quantities that independent producers and royalty owners are to use in calculating their allowances. See 26 U. S. C. §§ 613A(c)(3), (5).

Also during 1975, the families of Philip D. Farmar and A. A. Sugg, joint owners of 46,515 acres of land in Irion County, Tex., leased their oil and gas interests to various lessees. Under the leases, the Farmars and Suggs were to receive as royalties 20% of all oil and gas produced and sold from the property or 20% of the value of all oil and gas produced from the leases. The leases also provided that the Farmars and Suggs were to receive annual cash bonuses, beginning with a small sum in 1975 and continuing with large sums through 1979, over the life of the lease. These bonuses were payable even if no oil or gas was produced from the property. In 1976, oil and gas was discovered on the Irion property and was produced in substantial amounts. The Farmars and Suggs claimed percentage depletion deductions on both the bonuses and royalties received in that year. The Commissioner disallowed the percentage depletion deductions on the lease bonuses, again because income of this type was not received "with respect to" any "average daily production."

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[10] In a separate determination, the Tax Court held that lease bonuses, like advance royalties, were not subject to the allowance for percentage depletion. See *Glass* v. *Commissioner*, 76 T. C. 949 (1981).

After paying the resulting deficiencies, the Farmars and Suggs filed a consolidated suit for refund in the Court of Claims. The Court of Claims held for the Commissioner. 231 Ct. Cl. 642, 689 F. 2d 1017 (1982). It concluded that "[t]his statutory language regularly linking depletion directly to production during a taxable year indicates to us that Congress wanted depletion allowable only 'with respect to' income derived from, or connected with, actual extraction during the taxable year." *Id.*, at 649, 689 F. 2d, at 1021. Since lease bonus income was not so attributable, the court determined that the Farmars and Suggs were not entitled to a percentage depletion allowance on it. See *id.*, at 656–657, 689 F. 2d, at 1025.

The Commissioner sought a writ of certiorari from the adverse decision of the Court of Appeals for the Seventh Circuit, and the Farmars and Suggs sought a writ of certiorari from the adverse decision of the Court of Claims. We granted both writs, 459 U. S. 1102 (1983), and consolidated the cases so that we could decide the effect the Tax Reduction Act of 1975 had on percentage depletion of oil and gas income.

II

The 1975 amendments to the Code did not repeal any of the provisions that previously entitled taxpayers to an allowance for percentage depletion on lease bonus or advance royalty income arising from oil and gas mineral interests. Rather, the 1975 amendments added new § 613A, which, as its title indicates, is a "Limitatio[n] on percentage depletion in case of oil and gas wells." Our sole task in this case is to determine whether Congress, in enacting the § 613A "limitation," intended to deny the allowance for percentage depletion on advance royalty or lease bonus income altogether.

A

Our starting point, of course, is the language of the statute itself. That language authorizes any independent producer or royalty owner not otherwise disqualified, see 26 U. S. C. § 613A(d), to compute "the allowance for depletion under section 611 . . . in accordance with" § 613's "gross income from . . . property" concept. 26 U. S. C. § 613A(c)(1). That language also stipulates that the allowance be "with respect to . . . so much of the taxpayer's average daily production . . . as does not exceed the taxpayer's depletable . . . quantity . . . ." *Ibid.* The Commissioner and the taxpayers take different positions as to what this language means.

The Commissioner contends that new § 613A finally adopts the position he took a half century ago in the *Herring* case—namely, that taxpayers are not entitled to percentage depletion on any income not attributable to specific units of production during the taxable year.[11] He points to § 613A(c)(1)'s requirement that "the allowance . . . be computed . . . with respect to . . . the taxpayer's average daily production" and to the repeated references in §§ 613A(c)(2) through (10) to "aggregate production," "production during the taxable year," and "production during the calendar year." From these statutory reference points, the Commissioner contends that § 613A redefines depletable "gross income from . . . property" to be that income attributable to specific units of production during the taxable year.[12] Since lease bonuses and advance royalties are not attributable to *specific* production during any taxable year, the Commissioner concludes that Congress did not intend such receipts to be eligible for percentage, as opposed to cost, depletion. See Brief for Commissioner 18–24.

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[11] The Commissioner's view is embodied in proposed regulations. See 42 Fed. Reg. 24279 *et seq.* (1977).

[12] Interestingly enough, the Commissioner does not believe that the language should be literally interpreted in all circumstances. Although he interprets the statute to deny the allowance for percentage depletion on income received prior to production, see *id.*, at 24287 (proposed 26 CFR § 1.613A–7(f)(1)), he interprets it to permit the allowance when the situation is reversed—when extraction occurs in a taxable year prior to the year in which income is received. 42 Fed. Reg., at 24281 (proposed 26 CFR § 1.613A–3(a)(4)(7)).

The taxpayers, by contrast, suggest that Congress did not intend, by enacting new § 613A, to change the tax treatment of lease bonus or advance royalty income at all. Rather, they contend that the percentage depletion allowance is available regardless of whether physical extraction occurred during the year for which the deduction is claimed. Under their view, the reference to "average daily production" in § 613A constitutes a limitation on the amount of, rather than a prerequisite to, the deduction a taxpayer may claim. Furthermore, the requirement that the allowance be "with respect to" production is simply the pre-1975 recapture requirement reenacted: depletion deductions must always "be with respect to" actual or prospective extraction. Since lease bonus and advance royalty receipts are income arising from the property, the taxpayers conclude that they are eligible for percentage depletion so long as they do not exceed the § 613A limitation and production eventually occurs on the property. See Brief for Respondents in No. 82–599, pp. 5–9; Brief for Petitioners in No. 82–774, pp. 7–16.

The Commissioner's and taxpayers' interpretations do not exhaust the possible readings of this linguistic maze. For example, § 613A could also be read to change the *timing*, though not the availability, of the percentage depletion allowance.[13] Under this view, all income arising from the property would potentially be subject to an eventual allowance for depletion, but the actual deduction would be deferred to a year in which it could be attributed, by some allocation method, to actual production. Since lease bonus and advance royalty income always precede production, they would be included in taxable income during the year of receipt. The depletion allowance attributable to such receipts, however, would be capitalized and amortized against income in years of actual extraction, subject to the rates and depletable quantities limitations applicable in those subsequent years.[14]

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[13] See Jones, Analysis of CA–7 *Engle* Decision Allowing Percentage Depletion Absent Abstraction, 57 J. Taxation 230, 233 (1982); Bravenec, Continued Availability of Percentage Depletion on Oil and Gas, 23 Oil and Gas Tax Q. 204, 211–214 (1975); Note, Percentage Depletion on Oil and Gas Lease Bonuses and Advance Royalties: Engle v. Commissioner, Glass v. Commissioner, and Farmar v. United States Reviewed, 35 Baylor L. Rev. 97, 120–121 (1983).

Each of these possible interpretations of new § 613A can be reconciled with the language of the statute itself. Congress' repeated references to "production" during the "taxable year" could not have been completely inadvertent, but each of the possible interpretations gives meaning to those references. Our duty then is "to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." *NLRB* v. *Lion Oil Co.*, 352 U. S. 282, 297 (1957) (Frankfurter, J., concurring in part and dissenting in part). The circumstances of the enactment of particular legislation may be particularly relevant to this inquiry, *Watt* v. *Alaska*, 451 U. S. 259, 266 (1981), and it is to those circumstances that we now turn.

B

The 1975 amendments to the Code responded both to the public outcry concerning the country's growing dependence on foreign energy and to the alleged excessive profits that major integrated oil companies were earning. Congress wanted to encourage domestic production[15] and to improve the competitive position of "small producers"—the independents and the royalty owners—vis-à-vis the major integrated ones.[16] Section 613A's goal, more simply put, was to subsidize the combined efforts of small producers and royalty owners in the exploration and production of the Nation's oil and gas resources. Any reasonable interpretation of the statute, therefore, must harmonize with this goal.

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[14] See n. 13, *supra*.

[15] The House and Senate debates of the 1975 Congress are replete with references to the Nation's domestic oil and gas shortage. See, *e. g.*, 121 Cong. Rec. 4606 (1975) (remarks of Rep. Rhodes) ("I think we should all recall that one of the reasons for this bill being brought here with some haste is the fact that we have a shortage of domestic petroleum"); *id.*, at 7807 (remarks of Sen. Curtis) ("Our first objective should be the production of more gas and oil"); *ibid.* (remarks of Sen. Bartlett) ("I think it is important that we face up to the American people and say that this body has

If the Commissioner's interpretation were adopted, taxpayers would receive percentage depletion on income derived from oil and gas interests only if the payment associated with that income could be attributed directly to specific units of production. On that view, lessors and lessees interested in favorable tax benefits will not use financing arrangements that provide for prepayments on production, that spread income to nonproduction periods or, more importantly, that shift the risks of nonproduction to the parties better able to bear them.[17] Lessors naturally will begin demanding larger

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done next to nothing to increase the production of natural sources of energy in this country . . ."); *id.*, at 8128 (remarks of Sen. Dole) ("The 2,000 barrel . . . exemption from the depletion allowance repeal is vitally important to maintaining a high level of energy exploration and production"); *id.*, at 8944 (remarks of Rep. Pickle) ("In this time of national energy crisis, what we need—desperately—is more production").

[16] Members of Congress repeatedly emphasized that their efforts were aimed at the major integrated oil companies, and not the small producers. See, *e. g.*, *id.*, at 4610 (remarks of Rep. Cotter) ("[I]t will serve notice on the major oil companies that this new Congress will not be subservient to their unreasonable demands . . ."); *id.*, at 8865 (remarks of Sen. Hollings) ("Although as much as 85 percent of the oil production is now ineligible for the depletion allowance . . . as many as 98 percent of the oil producers in this country will still retain [percentage] depletion").

[17] Lease bonuses generally are not refundable to lessees even if no oil or gas is produced from the property. See *Shamrock Oil & Gas Corp.* v. *Commissioner*, 35 T. C. 979, 1057 (1961). Smaller risk-averse lessors, therefore, are likely to prefer these sums certain to uncertain sums, like advance royalties or royalty streams, that either may not materialize or may have to be returned. Cf. 121 Cong. Rec. 4641 (1975) (remarks of Rep. de la Garza) ("We are only hurting the little people" by repealing the percentage depletion deduction for royalty owners). Conversely, lessees

production royalties to offset the increased expense resulting from delayed receipt of payments, income bunching, and risk bearing. Lessees who are forced to pay the increased royalties will, in turn, have less money with which to purchase leases or to extract minerals therefrom. Thus, solely for tax reasons, lessors and lessees will choose less preferred forms of financing their exploration and production efforts and, in the long run, devote fewer dollars to development of the Nation's energy reserves. In short, the Commissioner's interpretation anomalously suggests that a Congress intent on increasing domestic production by small producers included substantial economic disincentives in the same enabling legislation. Such an interpretation does not comport with Congress' effort to increase production by the independent producers and royalty owners. By contrast, allowing percentage depletion on all qualified income arising from the property makes available the maximum public subsidy that Congress was willing to provide.

Ironically, the Commissioner defends his interpretation by reference to the oil and gas crisis that existed in 1975. See Reply Brief for Commissioner 7. He argues that if lessors are allowed percentage depletion only on income directly attributable to production, they will have strong incentives to encourage lessees to produce oil and gas immediately from the property. No one disputes this premise. Requiring lessors to *defer* percentage depletion deductions to years of actual production would indeed optimize the incentives for early production of the property. But the Commissioner has not suggested that the percentage depletion deductions on

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prefer to condition their advance payments on eventual production. See 3 H. Williams, Oil and Gas Law § 666, pp. 793–795 (1981). But since lessees can spread their risks over many leased properties, they predictably will be willing to pay nonrefundable lease bonuses in exchange for reduced prices on the overall lease arrangements. By pooling risks in this fashion, lessors and lessees, like insurers and their insureds, optimize the allocation of resources in the production of oil and gas from the property. See generally K. Arrow, Essays in the Theory of Risk Bearing 134–143 (1971).

advance royalties and lease bonuses be *deferred* to years of actual production; he argues that they be *eliminated* altogether. Eliminating the percentage depletion deductions, rather than deferring them, will reduce the total amount of "gross income" subject to the percentage depletion allowance and thereby shrink the public subsidy of domestic oil and gas production. Smaller public subsidies, in turn, mean reduced exploration and production incentives and smaller absolute quantities of domestic production. Thus, the Commissioner's initial premise—that Congress wanted to encourage domestic exploration and production—is against the general position he has taken with respect to lease bonus and advance royalty income.

C

The reasonableness of each possible interpretation of the statute can also be measured against the legislative process by which § 613A was enacted. When the 1975 amendments were introduced, neither the bill, H. R. 2166, 94th Cong., 1st Sess. (1975), nor the accompanying Ways and Means Committee Report, see H. Rep. No. 94–19 (1975), provided for repeal of the percentage depletion allowance on oil and gas wells. Rather, the provision repealing the percentage depletion allowance was introduced only during debate on the House floor. See 121 Cong. Rec. 4651–4652 (1975). This floor amendment did not contain any of the exemptions ultimately enacted as part of § 613A, including the exemption for independent producers and royalty owners. It was only when H. R. 2166 reached the Senate floor that the exemption for independent producers and royalty owners was added. See *id.*, at 7813. The Congress then enacted H. R. 2166, with slight alteration by the Conference Committee, as it was amended on the Senate floor.

At no time during either the Senate's or the Conference Committee's consideration of H. R. 2166 was a repeal of the percentage depletion allowance on lease bonus or advance royalty income suggested. Rather, both the Senate and the conferees agreed to maintain the percentage depletion allowance, in its entirety, for those small producers and royalty owners whose income from the property did not exceed that associated with the yearly depletable quantities.[18] As explained by the Conference Report, the proposed legislation

> "*retains* percentage depletion at 22 percent on a permanent basis for the small independent producer to the extent that his average daily production of oil *does not exceed* 2,000 barrels a day, or his average daily production of gas *does not exceed* 12,000,000 cubic feet. Where the independent producer has both oil and natural gas production, the *exemption* must be allocated between two types of production.
>
> . . . . .
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> ". . . The conference substitute follows the Senate amendment in providing a small producer *exemption* from the repeal of percentage depletion for oil and gas." H. R. Conf. Rep. No. 94–120, pp. 67–68 (1975) (emphasis added).

Thus, in exempting independent producers and royalty owners from the repeal, the Senate and the Conference Committee expressed a clear intent to *retain* the percentage depletion rules as they then existed. Again, the congressional intent is more in harmony with interpretations of the statute that retain percentage depletion on all forms of income than with the Commissioner's interpretation.

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[18] Thus, Senator Bentsen, who introduced one of the amendments to H. R. 2166, see 121 Cong. Rec. 7277 (1975), stated that the depletable figures were chosen "as a definition of a small producer . . . ." Hearings on H. R. 2166 before the Subcommittee on Energy of the Senate Committee on Finance, 94th Cong., 1st Sess., 2 (1975); see also 121 Cong. Rec. 7777 (1975). Similarly, Senator Dole stated that the 2,000-barrel figure "identif[ied] the particular importance of independent producers." *Id.*, at 8128. Senator Dole believed that the "exemption from the depletion allowance repeal [would] permit most of these small producers to remain in production, giving us the additional oil and gas that we so greatly need . . . . It will also encourage most of the independents who do the vast bulk of exploration in this country to continue their drilling programs." *Ibid.*

The Commissioner attempts to find legislative support for his interpretation not in the history of the enacting Congress, but in the history of a previous Congress. In H. R. 17488, 93d Cong., 2d Sess. (1974), the House proposed to repeal the percentage depletion allowance for oil and gas production and, at the same time, to exempt certain independent producers from the repeal. The House Ways and Means Committee Report on H. R. 17488 emphasized that "a lease bonus paid to the lessor of mineral lands in a lump sum or in installments is independent of any actual production from the lease and thus would not be within any of the exemptions." H. R. Rep. No. 93–1502, p. 46 (1974). The Commissioner suggests that "'[t]he idea of a special exemption for small entities, expressly involving production, was very much in the air of the 94th Congress, and it is not unlikely that the prior report was known to several, if not many, of the members who considered § 613A,' and almost certainly to those who proposed that Section 613A be added to the tax reduction bill." Reply Brief for Commissioner 6 (quoting 231 Ct. Cl., at 654, 689 F. 2d, at 1024).

In the 94th Congress, however, the House Ways and Means Committee reported out another bill, H. R. 2166, in lieu of H. R. 17488. This bill retained the percentage depletion allowance and differed from H. R. 17488 in many other respects. See 121 Cong. Rec. 4651–4652 (1975). Thus, it cannot be said that a subsequent Congress, or even the House Ways and Means Committee itself,[19] retained the same intent as reflected in H. R. 17488. Moreover, since it was the Senate, and not the House, that added the small-producer exemption to H. R 2166,[20] we must dismiss the Commissioner's reconstruction of the legislative intent as mere wishful thinking. The idea of an exemption for small producers was certainly in the "air" of the 94th Congress, but we find no evidence that a change in the definition of depletable "gross income" was aloft with it.[21]

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[19] In the 93d Congress, 25 Representatives, including Chairman Wilbur Mills, served on the Ways and Means Committee. 95th Congress Legislative Record of the Committee on Ways and Means, 95th Cong., 2d Sess. 359 (Comm. Print 1979) (listing Committee membership). In the 94th Congress, the Committee grew to 37 members, was chaired by Representative Al Ullman, and had 18 new members. *Id.*, at 360. Thus, not only is it difficult to believe the Committees of the 93d and 94th Congresses had

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We have noted that "[t]he true meaning of a single section of a statute in a setting as complex as that of the revenue acts, however precise its language, cannot be ascertained if it be considered apart from related sections, or if the mind be isolated from the history of the income tax legislation of which it is an integral part." *Helvering* v. *Morgan's, Inc.*, 293 U. S. 121, 126 (1934). When the Commissioner's, the taxpayers', and the commentators' interpretations of § 613A are viewed in these terms, it becomes clear to us that Congress did not mean, as the Commissioner's interpretation suggests, to withdraw the percentage depletion allowance on

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the same intent, it is also hard to characterize them as being the same Committee.

[20] The Senate amendment differed from the exemption contained in H. R. 17488 in still other respects. For example, the Senate amendment allowed percentage depletion at a rate of 22% and with respect to 2,000 barrels of average daily production. H. R. 17488, by contrast, provided for percentage depletion at the rate of 15% with respect to the first 3,000 barrels of production per day.

[21] The Commissioner also points to deliberations in subsequent sessions of Congress, that never culminated in legislation, to support his position. See Brief for Commissioner 30–32. We find this particular history to be ambiguous at best: Postenactment interpretive material of this type is a "hazardous basis for inferring the meaning of a congressional enactment." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 118, and n. 13 (1980); see also *Southeastern Community College* v. *Davis*, 442 U. S. 397, 411, and n. 11 (1979).

lease bonus or advance royalty income arising from oil and gas properties.

The 1975 Congress was concerned with shrinking domestic production levels and with assisting smaller producers to compete with the larger ones. Since most depletion deductions are on royalty payments attributable to actual production, Congress, in its haste, not surprisingly defined the class of taxpayers exempted from the percentage depletion repeal in terms of certain production levels. Section 613A clearly provides that income attributable to production *over* a certain level will not be eligible for percentage depletion. But nothing in the statute bars percentage depletion on income received prior to actual production. To the contrary, we agree that so long as the income can, by some allocation method, be attributed to production below the ceilings Congress established, lease bonus and advance royalty income come within the four corners of the percentage depletion provisions. Lease bonuses and advance royalties are payments received in advance for oil and gas to be extracted, see *Herring* v. *Commissioner*, 293 U. S. 322 (1934), and therefore should be subject to the § 613(a) computation of, and § 611 allowance for, oil and gas depletion.

III

Unable to find persuasive support for his position in the text, general purpose, or specific history of the Tax Reduction Act of 1975, the Commissioner reminds us both that the "choice among reasonable interpretations is for the Commissioner, not the courts," *National Muffler Dealers Assn., Inc.* v. *United States*, 440 U. S. 472, 488 (1979), and that his choice, if found to "implement the congressional mandate in some reasonable manner," must be upheld. *United States* v. *Correll*, 389 U. S. 299, 307 (1967). "But that principle [only sets] the framework for judicial analysis; it does not displace it. We find that the [Commissioner's interpretation] is . . . unreasonable," and we therefore cannot defer to it. *United*

States v. *Cartwright*, 411 U. S. 546, 550 (1973) (similarly refusing to defer to unreasonable position of Commissioner).

Holders of economic interests in oil and gas deposits have consistently been entitled to a percentage depletion allowance on *all* income arising from their property, including lease bonuses and advance royalties, for the past 50 years. See *Herring* v. *Commissioner*, *supra*. Our cases have taken a longrun view of the relation between income and production, and we have interpreted the Code to allow percentage depletion on all income so long as actual extraction eventually occurs. See *Douglas* v. *Commissioner*, 322 U. S. 275 (1944). We usually presume that "Congress is . . . aware of [our longstanding] interpretation of a statute and adopt[s] that interpretation when it re-enacts [the] statute without [explicit] change . . . ." *Lorillard* v. *Pons*, 434 U. S. 575, 580 (1978); see also *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 414, n. 8 (1975). Had Congress meant to eliminate the percentage depletion allowance on lease bonus and advance royalty income, we believe it would have addressed our decisions to the contrary more explicitly. See *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270, 289 (1956). Since Congress did not, we find the Commissioner's shortrun view of the relation between income and production to be at odds with the amended statutory scheme.

The percentage depletion provisions, as modified in 1975, plainly were intended to encourage independent producers and royalty owners to explore and develop the Nation's domestic oil and gas deposits. See *supra*, at 217–218. Yet the Commissioner would discourage these small producers from using the financing arrangements that would optimize their combined efforts to produce oil and gas. See *supra*, at 218–220. Not only would the Commissioner deny lessors percentage depletion on lease bonus and advance royalty income, but he also would continue to require lessees to reduce their depletion allowances by the amounts lessors *would* have been allowed, under pre-1975 law, to deplete. See Rev. Rul.

81–266, 1981–2 Cum. Bull. 139. The Commissioner would allow *no one* to take the single allowance that the statute clearly contemplates *someone* should take. See 26 U. S. C. §§ 611(b)(1), 613(a). Thus, the Commissioner not only skews the industry's preferred means of financing oil and gas exploration, but he unreasonably denies that industry a subsidy Congress expressly contemplated it should receive.[22] Such an interpretation is "unrealistic and unreasonable," and therefore is not entitled to deference. *United States* v. *Cartwright, supra,* at 550.

Finally, the Commissioner has not persuaded us of any "insurmountable" practical problems that would render his position more tenable. We do not doubt that § 613A's various production requirements and limitations make accurate calculation of the percentage depletion allowance difficult in the absence of actual production figures. See 76 T. C., at 926. But we believe the Commissioner can resolve these problems in a number of reasonable ways, for example, by requiring lessors to defer depletion deductions to years of actual production or by requiring lessors to adjust deductions taken with amended returns filed in later tax years.[23] The Commissioner has broad authority to prescribe all "needful rules and regulations" for the enforcement of the tax laws, see 26 U. S. C. §7805(a), and it is up to him to choose the method that best implements the statutory mandate. See *United States* v. *Correll*, 389 U. S., at 306–307. What the Commissioner cannot do—because it is an "unreasonable" interpretation of the statutory language in light of its history and purpose—is to resolve the practical problems by eliminating the allowance altogether. Eliminating the allowance might make the statute "simpler to administer," Reply Brief for Commissioner 9, and n. 8, but it does so by ignoring the language of the statute, the views of those who sought its enactment, and the purpose they articulated.

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[22] In *Helvering* v. *Twin Bell Oil Syndicate,* 293 U. S. 312 (1934), this Court interpreted § 613(a) to allow the Commissioner to require lessees, for purposes of computing percentage depletion, to reduce their gross incomes by the advance payments made to lessors. Congress later codified this rule in § 611(b), 26 U. S. C. § 611(b), which requires that the deduction for depletion be equitably apportioned between lessor and lessee. The Commissioner has implemented § 611(b) by requiring lessees to capitalize the lease bonus or advance royalty payments made and to amortize those capitalized costs over the productive life of the well. See 26 CFR § 1.1613–2(c)(5) (1983). The very fact that §§ 611(b) and 613(a) were left intact by the 1975 amendments is itself some indication that Congress did not intend to deny the depletion benefit on advance payments to lessors. See Note, 35 Baylor L. Rev., at 120–121.

[23] See Jones, 57 J. Taxation, at 233; Note, 35 Baylor L. Rev., at 122. The Commissioner currently requires much the same treatment from lessees. See n. 22, *supra.*

IV

In cases such as these, where the effective and expeditious enforcement of our Nation's tax laws is at issue, what we do not decide is as important as what we do decide. These cases do not concern whether taxpayers must include bonuses and advance royalties in their income in the year of receipt. No one questions that taxpayers must do that. See *North American Oil Consolidated* v. *Burnet*, 286 U. S. 417 (1932). Nor do these cases concern the appropriate tax period in which the percentage depletion deduction should be used to offset taxable income. That issue is a significant one, but none of the parties has directly raised it for our review. Cf. 26 CFR §1.461–1 (1983) (assets having useful life beyond close of year not necessarily deductible in year expenditure made). Rather, our decision holds only that §§611–613A of the Code entitle taxpayers to an allowance for percentage depletion on lease bonus or advance royalty income at some time during the productive life of the lease.

Accordingly, since the Commissioner has never contested the tax period in which the Engles claimed their percentage depletion deduction, the judgment of the Court of Appeals for the Seventh Circuit in No. 82–599 is affirmed.[24] The judgment of the Court of Claims in No. 82–774 denying the Farmars and Suggs any percentage depletion on their lease bonus income is reversed, and the case is remanded for further proceedings in conformity with this opinion.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL join, dissenting.

The Court's decision today is a troubling one, perhaps less for where the Court has ended up than for how it arrived there. Under the principles that traditionally have governed this Court's approach to statutory interpretation in the field of federal tax law, the Commissioner's administrative interpretation is entitled to prevail so long as it is not "'unreasonable and plainly inconsistent with the revenue statutes.'" *Bingler* v. *Johnson*, 394 U. S. 741, 749–750 (1969), quoting *Commissioner* v. *South Texas Lumber Co.*, 333 U. S. 496, 501 (1948); accord, *Thor Power Tool Co.* v. *Commissioner*, 439 U. S. 522, 533, n. 11 (1979); *Fulman* v. *United States*, 434 U. S. 528, 533 (1978). While the Court professes to adhere to this rule today, *ante*, at 224–225, a review of the Court's reasoning suggests that the Court has chosen to honor the rule in the breach. Because I regard the Commissioner's interpretation as consistent with the language of the controlling statute, its legislative history, and the policies underlying § 613A of the 1954 Code, 26 U. S. C. § 613A, and because his interpretation surely is as reasonable in these respects as the rival interpretations advanced by the taxpayers and the Court, I must dissent.

I

The Court concedes that interpreting § 613A to disallow percentage depletion for advance royalties and lease bonuses is compatible with the language of the statute. *Ante*, at 215–217. I am less sanguine than the Court about how easily § 613A can be read to accommodate the depletion rule of *Herring* v. *Commissioner*, 293 U. S. 322 (1934). Section 613A(c)(1) requires that percentage depletion be calculated with respect to "average daily production," which in turn is defined in terms of "aggregate production of domestic crude oil or natural gas . . . *during the taxable year.*" § 613A(c)(2) (emphasis added). "Taxable year" is defined by § 7701(23) to mean the calendar or fiscal year "upon the basis of which the taxable income is computed under subtitle A." When a taxpayer claims percentage depletion for advance royalties or lease bonuses in a calendar or fiscal year in which no oil or gas is produced, he necessarily asks that "taxable year" be given a meaning in § 613A(c) different from the one assigned to it by § 7701(23), because the "taxable year" defined by § 7701(23) is one during which no "aggregate production," and hence no "average daily production," has occurred. In any event, the depletion rule sought by the taxpayers in these cases certainly does not fit the language of § 613A so closely that the Commissioner's interpretation becomes unreasonable on textual grounds.

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[24] We express no opinion concerning whether the Commissioner is precluded from raising this issue in another proceeding.

The *Herring* rule also produces what the Court itself characterizes as difficult practical problems under § 613A(c). Because the depletion limitations contained in § 613A(c) are couched in terms of quantities of output, a taxpayer who claims percentage depletion on advance royalties or lease bonuses before production has occurred cannot possibly establish *ex ante* how many barrels of oil or cubic feet of gas his advance payment represents. The problem is exacerbated by the fact that the limitations of § 613A(c) vary depending on the type of fuel produced and the nature of the extraction process, factors that often cannot be known before production begins. See §§ 613A(c)(4) and (6). A review of the academic literature, see *ante*, at 216–217, and n. 13, appears to have convinced the Court that these problems can be overcome by deferring the depletion allowance for advance royalties and lease bonuses to years in which the allowance can be attributed "by some allocation" to actual production. This timing theory, however, has its own practical problems. In particular, it is unclear how the taxpayer is to apply the income limitations of § 613(a) and § 613A(d)(1), under which the depletion allowance is limited to 50 percent of the taxpayer's taxable income from the property and 65 percent of his overall taxable income, when the income that gives rise to the allowance is recognized in one year and the allowance itself is taken in one or more subsequent years.[1]

The Court's assertion that the Commissioner can resolve the problems caused by retention of percentage depletion for advance royalties and lease bonuses "in a number of reasonable ways," *ante*, at 226–227, stands the normal rationale for judicial deference to administrative interpretations of the tax laws on its head. One reason for that deference is that the Commissioner is better able than any court, including this one, to assess the practical consequences of particular interpretations and to resolve statutory ambiguities in ways that minimize administrative difficulties. Rather than give due regard to this expertise in the first instance in construing § 613A, the Court has embraced an interpretation whose practical complications the Court itself recognizes and has left the Commissioner to bring order to the confusion that the Court now has created. Ockham's razor is nowhere in evidence.

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[1] In his dissent (favorable to the taxpayers) from the Tax Court's decision in No. 82–599, Judge Fay stated that "if income were recognized in one year and percentage depletion deductions calculated on that income were taken in other years, the amount of deduction limits based on taxable income found in secs. 613(a) and 613A(d)(1) would be nonsensical." 76 T. C. 915, 945, n. 10 (1981). At a minimum, the administrative problems would seem to be multiplied by the allowance carryforward provision of § 613A(d)(1), under which an allowance that is disallowed by the 65-percent ceiling in one taxable year is carried forward to subsequent years.

To justify its rejection of an administrative interpretation that is consistent with the statutory language and at least as administrable as any other interpretation, the Court relies in part on the legislative history of § 613A. Contrary to the views of the Court, however, nothing in "the legislative process by which § 613A was enacted," *ante*, at 220, makes it unreasonable to interpret § 613A to disallow percentage depletion for advance royalties and lease bonuses. Section 613A is the product of a major effort in both Houses of Congress in 1975 to abolish the percentage depletion allowance altogether. With minor exceptions not relevant here, H. R. 2166 was amended by the House to accomplish that result. See 121 Cong. Rec. 4651–4652, 4657–4658 (1975). When the full Senate took up consideration of H. R. 2166, after the Senate Finance Committee had reported out a version of the bill that lacked any percentage depletion provisions, Senator Hollings and other Senators sought to abolish percentage depletion immediately for major oil and gas producers and to eliminate it over a 5-year period for independent producers. See *id.*, at 7238–7239. The Senate agreed to repeal percentage depletion for major producers, but initially approved an amendment by Senator Bentsen that would have retained percentage depletion indefinitely with respect to average daily production of 3,000 barrels of oil and an additional 18,000,000 cubic feet of natural gas. See *id.*, at 7304–7305. The Senate thereafter effectively reduced the Bentsen amendment's production figures by two-thirds by lowering the subsidized production levels to either 2,000 barrels of oil or 12,000,000 cubic feet of natural gas. See *id.*, at 7807–7808, 7813. The Conference Committee cut back still further on the surviving allowance by providing for an eventual reduction in both the production figures (from 2,000 to 1,000 barrels) and the depletion percentage itself (from 22 to 15 percent). H. R. Conf. Rep. No. 94–120, p. 68 (1975).

Given that the Congress not only abolished percentage depletion for major oil producers but significantly curtailed it for independent producers, and given that even the Senate's qualified perpetuation of percentage depletion for independent producers underwent further restrictions before § 613A became law, the silence of the legislative record about the continued availability of percentage depletion for lease bonus and advance royalty income is hardly compelling evidence that Congress meant to preserve the status quo in this one incidental respect. The Court relies on the Conference Report's statement that the Senate version of § 613A (which the Court characterizes as "the proposed legislation," *ante*, at 221) "*retains* percentage depletion at 22 percent . . . for the small independent producer to the extent that his average daily production of oil does not exceed 2,000 barrels a day . . . ." H. R. Conf. Rep. No. 94–120, at 67 (emphasis added). However, as the Seventh Circuit itself pointed out in No. 82–599, the use of the word "retains" casts no light whatsoever on the continued applicability of the *Herring* rule because § 613A(c) "retains" percentage depletion for independent producers regardless of whether physical extraction is made a precondition for the allowance. See 677 F. 2d 594, 600 (1982). Similarly, the Conference Report states only that the conference substitute "follows the Senate amendment in providing a small producer exemption from the *repeal* of percentage depletion," H. R. Conf. Rep. No. 94–120, at 68 (emphasis added); the fact that § 613A does not repeal percentage depletion for independent producers altogether does not mean that § 613A was meant to leave percentage depletion for independent producers untouched. To say, as the Court does, that the Conference Committee agreed to maintain percentage depletion "in its entirety" for producers and royalty owners who satisfied the various newly introduced production limitations in § 613A(c), *ante*, at 221, is to say that Congress preserved percentage depletion unchanged for those who were not affected by the changes—a truism that casts no light on the scope of those changes. The Court's easy conclusion that Congress explicitly would have addressed this Court's decisions in *Herring* v. *Commissioner* and its progeny had Congress meant to alter prevailing depletion rules, see *ante*, at 225, overlooks not only the haste in which Congress acted[2] but also the extent to which § 613A dismantles the entire structure of percentage depletion allowances on which *Herring* rested.

Given the poverty of § 613A's legislative history as a source for the Court's conclusion that the Commissioner's interpretation is unreasonable, the Court ultimately must rest its analysis on its characterization of the underlying purpose of Congress. Reasoning principally from the fact that the Tax Reduction Act of 1975 was enacted during a period of national concern over energy shortages, the Court assumes that Congress' fundamental purpose was to "increase production by the independent producers and royalty owners." *Ante*, at 219.[3] The Commissioner's interpretation of § 613A is taken

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[2] Section 613A is a relatively minor portion of the Tax Reduction Act of 1975, Pub. L. 94–12, 89 Stat. 26. The principal purpose of the Act was to provide a tax cut to counteract the effects of the then-current recession. Because of the perceived need for an immediate tax stimulus, the Act proceeded through Congress with unusual speed. The amendments that became § 613A were introduced on the floor of both Houses of Congress rather than during committee proceedings, and the time devoted to their consideration and debate was severely limited. See Landis, The Impact of the Income Tax Laws on the Energy Crisis: Oil and Congress Don't Mix, 64 Calif. L. Rev. 1040, 1061, n. 126 (1976).

[3] The Court supports its conclusion that Congress meant to encourage domestic production by quoting the views of Senators and Representatives who spoke of the importance of this goal. *Ante*, at 217–218, n. 15. With the exception of Senator Dole and the less certain exception of Representative Rhodes, however, the legislators on whom the Court relies were opponents of the legislation whose purpose the Court is considering. See, *e. g.*, 121 Cong. Rec. 7813, 8133, 8878–8879 (1975) (votes of Sen. Bartlett and Sen. Curtis); *id.*, at 8124 (remarks of Sen. Bartlett). See also *id.*, at 4606 (remarks of Rep. Rhodes) (noting importance of maintaining domestic energy production and expressing concern whether "we might be going the wrong way" by eliminating percentage depletion). Representative Pickle, whose comment about the need for more energy production the Court quotes, stated in full:

"*I am concerned and disappointed that the oil depletion allowance has been eliminated or severely limited* [by § 613A]. I do not think this will be to be inconsistent with this purpose because, while it preserves a substantial percentage depletion allowance for independent producers, it results in an effective subsidy smaller than the one produced by the depletion rule of *Herring* v. *Commissioner* and the variations on that rule that the Court surveys. The Court reasons that lessors who desire preproduction payments must either forgo the tax benefits previously associated with those payments or shift to less desirable forms of production-linked payments. In either case, according to the Court, they will demand increased absolute levels of payment to compensate them for the less attractive tax and risk-shifting features of alternative payment schemes, leaving producers with fewer funds for exploration and production and a reduced rate of return on invested capital. In sum, § 613A was meant to maximize production subsidies for independent producers; because the Commissioner's interpretation does not do so, the Court concludes, it is incorrect.

With due respect, this analysis simply ignores the terms and structure of the statute that it purports to construe. Section 613A(c) cannot have been meant to increase production by independent producers over pre-existing levels; it did not create a new tax subsidy but merely preserved an old one. More importantly, that subsidy was not preserved intact but rather was deliberately scaled back. The maximum depletable oil quantity was reduced from 2,000 barrels in 1975 to 1,000 barrels in 1980 and thereafter. See § 613A(c)(3)(B). Even independent producers whose output fell within the 1,000-barrel limit had their production subsi-

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good for the country. In this time of national energy crisis, what we need—desperately—is more production. The way to get more production is to offer incentives for more drilling. *We have worked in reverse.*" *Id.*, at 8944 (emphasis added).

Presumably the Court has other legislators in mind when it states that the Commissioner's interpretation ignores "the views of those who sought [§ 613A's] enactment, and the purpose they articulated." *Ante*, at 227.

dies substantially curtailed, for the depletion percentage itself was reduced from 22 percent in 1980 to 15 percent in 1984 and beyond—a 32-percent reduction. See § 613A(c)(5). Congress further limited the subsidy by providing that the percentage depletion allowance could not exceed 65 percent of the taxpayer's taxable income. See § 613A(d)(1).[4] Finally, Congress denied percentage depletion to most transferees of interests in "proven" oil and gas property transferred after December 31, 1974. See § 613A(c)(9); H. R. Conf. Rep. No. 94-120, at 67-68.

When read as a whole, therefore, § 613A not only fails to increase incentives for independent producers but actually *reduces* them. This is hardly a remarkable result, since § 613A is the product of a hard-bargained compromise between the Senate conferees, who sought to preserve a stable subsidy for independent producers, and the House conferees, who sought to abolish percentage depletion for independent producers and royalty owners outright. See, *e. g.*, 121 Cong. Rec. 8918 (1975) (remarks of Rep. Ullman). However, it ill accords with the Court's pristine view of § 613A as a carefully calibrated attempt to provide maximum production incentives to independent producers. Even if disallowing percentage depletion of advance royalties and lease bonuses limits the total subsidy available to independent producers and royalty owners, it is hard to see how this makes the Commissioner's interpretation unreasonable or incorrect when § 613A on its face achieves the same result.[5] In the end, the Court's indictment of the Commissioner's interpretation depends on a single-minded congressional purpose that simply did not exist.

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[4] As previously noted, § 613A(d)(1) contains a carryforward provision, under which an amount disallowed by the 65-percent ceiling "shall be treated as an amount allowable as a deduction . . . for the following taxable year," subject once again to the 65-percent ceiling. This provision mitigates the effect of the 65-percent ceiling but obviously does not eliminate it.

[5] I do not mean to suggest that simply because Congress limited percentage depletion allowances for independent producers in other ways, it must have chosen to discard the depletion rule of *Herring* v. *Commissioner*

II

The Court purports to accept the principle that the "choice among reasonable interpretations [of federal tax laws] is for the Commissioner, not the courts." *National Muffler Dealers Assn., Inc.* v. *United States*, 440 U. S. 472, 488 (1979). *Ante*, at 224. However, given the compatability of the language of § 613A with the Commissioner's views, the record of legislative compromise that lies behind the statute, the extent to which § 613A restricts percentage depletion for independent producers and royalty owners as well as for major integrated oil and gas companies, and the conceded practical complications caused by attempts to graft *Herring*'s depletion rule onto the new provision, the Court's rejection of the Commissioner's interpretation of § 613A is impossible to square with that principle.[6] The Court's decision therefore concerns me not simply as an interpretation of a discrete section of the Internal Revenue Code but as a sign of the Court's

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as well. Rather, the fact that Congress substantially limited pre-existing incentives for independent producers makes it impossible to dismiss the Commissioner's interpretation of § 613A as "unreasonable" on the ground that it provides a smaller incentive than rival interpretations.

[6] The Court suggests that the Commissioner's position on the availability of percentage depletion for advance royalty and lease bonus income is inconsistent with his position on the availability of percentage depletion when the year of extraction precedes the year in which income is received. See *ante*, at 215, n. 12. The Court further suggests that the perpetuation of the "bonus exhaustion" rule, under which a lessee must exclude the lease bonuses and advance royalties when computing his "gross income from the property" under § 613(a), cannot be justified if lease bonus and advance royalty income is not subject to percentage depletion in the hands of a lessor. See *ante*, at 225–226. The correctness of the Commissioner's views on these two points is not at issue here and does not affect the reasonableness of the Commissioner's position concerning advance royalties and lease bonuses.

willingness to displace the Commissioner's interpretation of the tax laws with its own views of tax policy. The Commissioner is vested with the responsibility to administer a complex and often ambiguous statutory scheme, and fidelity to the integrity of that scheme requires courts to entertain the Commissioner's settled administrative interpretations with respect. We recognized in *United States* v. *Cartwright*, 411 U. S. 546, 550 (1973), that "this Court is not in the business of administering the tax laws of the Nation." By reading its own conception of desirable federal tax policy into a statute that bears little evidence of having been designed to further those ends, the Court today not only has intruded on the Commissioner's responsibilities in this area but also has disregarded its own.

I dissent.

SILKWOOD, ADMINISTRATOR OF THE ESTATE OF SILKWOOD *v.* KERR-McGEE CORP. ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 81–2159. Argued October 4, 1983—Decided January 11, 1984

Appellant's decedent, a laboratory analyst at a federally licensed nuclear plant in Oklahoma operated by appellee Kerr-McGee Nuclear Corp. (hereafter appellee), was contaminated by plutonium. Subsequently, after the decedent was killed in an unrelated automobile accident, appellant, as administrator of the decedent's estate, brought a diversity action in Federal District Court based on common-law tort principles under Oklahoma law to recover for the contamination injuries to the decedent's person and property. The jury returned a verdict in appellant's favor, awarding, in addition to actual damages, punitive damages as authorized by Oklahoma law. The Court of Appeals, *inter alia*, reversed as to the punitive damages award on the ground that such damages were pre-empted by federal law.

Held:

1. The appeal is not within this Court's appellate jurisdiction under 28 U. S. C. § 1254(2). The Court of Appeals held that because of the pre-emptive effect of federal law, punitive damages could not be awarded. It did not purport to rule on the constitutionality of the Oklahoma punitive damages statute, which was left untouched. The decision, however, is reviewable by writ of certiorari. Pp. 246–248.

2. The award of punitive damages is not pre-empted by federal law. Pp. 248–258.

(a) The federal pre-emption of state regulation of the safety aspects of nuclear energy, see *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, does not extend to the state-authorized award of punitive damages for conduct related to radiation hazards. There is ample evidence that Congress had no intention, when it enacted and later amended the Atomic Energy Act of 1954, of forbidding the States to provide remedies for those suffering injuries from radiation in a nuclear plant. Nor is appellee able to point to anything in the legislative history of the Price-Anderson Act—which established an indemnification scheme for operators of nuclear facilities—or in the implementing regulations that indicates that punitive damages were not to be allowed. Rather, it is clear that in enacting and amending the Price-Anderson Act, Congress assumed that state-law remedies were available to those injured by nuclear incidents, even though Congress was aware of the Nuclear Regulatory Commission's exclusive authority to regulate safety matters. Insofar as damages for radiation injuries are concerned, pre-emption should not be judged on the basis that the Federal Government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law. Pp. 249–256.

(b) The award of punitive damages in this case does not conflict with the federal remedial scheme under which the NRC is authorized to impose civil penalties on licensees for violation of federal standards. Paying both federal fines and state-imposed punitive damages for the same incident is not physically impossible, nor does exposure to punitive damages frustrate any purpose of the federal remedial scheme. The award of punitive damages does not hinder the purpose of 42 U. S. C. § 2013(d) "to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes," since Congress disclaimed any interest in accomplishing this purpose by means that fail to provide adequate remedies to those injured by exposure to hazardous nuclear materials. Finally, the punitive damages award does not conflict with Congress' intent to preclude dual regulation of radiation hazards, since, as indicated above, Congress did not believe that it was inconsistent to vest the NRC with exclusive regulatory authority over the safety aspects of nuclear development while at the same time allowing plaintiffs like appellant to recover for injuries caused by nuclear hazards. Pp. 257–258.

667 F. 2d 908, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 258. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and MARSHALL and BLACKMUN, JJ., joined, *post*, p. 274.

Michael H. Gottesman argued the cause for appellant. With him on the briefs were *Arthur R. Angel*, *Robert M. Weinberg*, *Jeremiah A. Collins*, *James A. Ikard*, *Gerald L. Spence*, and *Daniel P. Sheehan*.

C. Lee Cook, Jr., argued the cause for appellees. With him on the brief were *William G. Paul*, *L. E. Stringer*, *Elliott C. Fenton*, *Larry D. Ottaway*, *William T. McGrath*, *Pamela J. Kempin*, and *Richard R. Wilfong*.

John H. Garvey argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Lee* and *Deputy Solicitor General Bator*.*

JUSTICE WHITE delivered the opinion of the Court.

Last Term, this Court examined the relationship between federal and state authority in the nuclear energy field and concluded that States are precluded from regulating the

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*Briefs of *amici curiae* urging reversal were filed for the National Women's Health Network by *Anthony Z. Roisman;* for the State of Arizona et al. by *Robert Abrams*, Attorney General of New York, *Peter H. Schiff*, and *Ezra I. Bialik*, Assistant Attorney General, *Robert K. Corbin*, Attorney General of Arizona, and *Anthony B. Ching*, Solicitor General, *Joseph L. Lieberman*, Attorney General of Connecticut, and *Peter J. Jenkelunas*, Assistant Attorney General, *Tany S. Hong*, Attorney General of Hawaii, and *Michael A. Lilly*, First Deputy Attorney General, *William J. Guste, Jr.*, Attorney General of Louisiana, and *Kendall L. Vick*, Assistant Attorney General, *Francis X. Bellotti*, Attorney General of Massachusetts, and *Stephen M. Leonard*, Assistant Attorney General, *Brian McKay*, Attorney General of Nevada, *Irwin I. Kimmelman*, Attorney General of New Jersey, and *James J. Ciancia*, Assistant Attorney General, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, and *E. Dennis Muchnicki*, Assistant Attorney General, *Leroy S. Zimmerman*, Attorney General of Pennsylvania, *T. Travis Medlock*, Attorney General of South Carolina, and *Richard P. Wilson*, Assistant Attorney General, *Jim Mattox*, Attorney General of Texas, and *David R. Richards*, Executive Assistant Attorney General, and *Jim Mathews*, Assistant Attorney General, *John J. Easton, Jr.*, Attorney General of Vermont, and *W. Gilbert Livingston*, Assistant Attorney General, *Bronson C. La Follette*, Attorney General of Wisconsin, and *A. G. McClintock*, Attorney General of Wyoming; and for the State of Minnesota by *Hubert H. Humphrey III*, Attorney General, and *Jocelyn Furtwangler Olson*, Special Assistant Attorney General.

A brief of *amicus curiae* urging affirmance was filed by *Harry H. Voigt*, *Michael F. McBride*, and *Linda L. Hodge* for the Atomic Industrial Forum, Inc.

A brief of *amicus curiae* was filed by *Joseph H. Rodriguez* and *Michael L. Perlin* for the New Jersey Department of the Public Advocate.

safety aspects of nuclear energy. *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Comm'n*, 461 U. S. 190, 211–213 (1983). This case requires us to determine whether a state-authorized award of punitive damages arising out of the escape of plutonium from a federally licensed nuclear facility is pre-empted either because it falls within that forbidden field or because it conflicts with some other aspect of the Atomic Energy Act.

I

Karen Silkwood was a laboratory analyst for Kerr-McGee[1] at its Cimarron plant near Crescent, Okla. The plant fabricated plutonium fuel pins for use as reactor fuel in nuclear powerplants. Accordingly, the plant was subject to licensing and regulation by the Nuclear Regulatory Commission (NRC) (then the Atomic Energy Commission) pursuant to the Atomic Energy Act, 42 U. S. C. § 2011 *et seq.* (1976 ed. and Supp. V).[2]

During a 3-day period of November 1974, Silkwood was contaminated by plutonium from the Cimarron plant. On November 5, Silkwood was grinding and polishing plutonium samples, utilizing glove boxes designed for that purpose.[3] In accordance with established procedures, she checked her hands for contamination when she withdrew them from the glove box. When some contamination was detected, a more extensive check was performed. A monitoring device revealed contamination on Silkwood's left hand, right wrist, upper arm, neck, hair, and nostrils. She was immediately decontaminated, and at the end of her shift, the monitors detected no contamination. However, she was given urine and fecal kits and was instructed to collect samples in order to check for plutonium discharge.

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[1] Silkwood was employed by Kerr-McGee Nuclear Corp., a subsidiary of Kerr-McGee Corp. The jury found that the former was the "mere instrumentality" of the latter. We therefore refer to both as Kerr-McGee.

[2] Under 42 U. S. C. § 2073, the Commission is authorized to issue licenses to those who handle special nuclear materials like the plutonium processed in Kerr-McGee's plant. Section 2201(b) empowers the Commission to set standards and issue instructions to govern the possession and use of such materials. On April 2, 1970, Kerr-McGee obtained a license to receive and possess special nuclear materials at its Cimarron plant. It closed the plant in 1975.

[3] A glove box is a supposedly impervious box surrounding the plutonium-processing equipment which has glove holes permitting the operator to work on the equipment or the plutonium from outside the box.

The next day, Silkwood arrived at the plant and began doing paperwork in the laboratory. Upon leaving the laboratory, Silkwood monitored herself and again discovered surface contamination. Once again, she was decontaminated.

On the third day, November 7, Silkwood was monitored upon her arrival at the plant. High levels of contamination were detected. Four urine samples and one fecal sample submitted that morning were also highly contaminated.[4] Suspecting that the contamination had spread to areas outside the plant, the company directed a decontamination squad to accompany Silkwood to her apartment. Silkwood's roommate, who was also an employee at the plant, was awakened and monitored. She was also contaminated, although to a lesser degree than Silkwood. The squad then monitored the apartment, finding contamination in several rooms, with especially high levels in the bathroom, the kitchen, and Silkwood's bedroom.

The contamination level in Silkwood's apartment was such that many of her personal belongings had to be destroyed. Silkwood herself was sent to the Los Alamos Scientific Laboratory to determine the extent of contamination in her vital body organs. She returned to work on November 13. That night, she was killed in an unrelated automobile accident. 667 F. 2d 908, 912 (CA10 1981).

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[4] At trial, the parties stipulated that the urine samples had been spiked with insoluble plutonium, *i. e.*, plutonium which cannot be excreted from the body. However, there was no evidence as to who placed the plutonium in the vials.

Bill Silkwood, Karen's father, brought the present diversity action in his capacity as administrator of her estate. The action was based on common-law tort principles under Oklahoma law and was designed to recover for the contamination injuries to Karen's person and property. Kerr-McGee stipulated that the plutonium which caused the contamination came from its plant, and the jury expressly rejected Kerr-McGee's allegation that Silkwood had intentionally removed the plutonium from the plant in an effort to embarrass the company. However, there were no other specific findings of fact with respect to the cause of the contamination.

During the course of the trial, evidence was presented which tended to show that Kerr-McGee did not always comply with NRC regulations. One Kerr-McGee witness conceded that the amount of plutonium which was unaccounted for during the period in question exceeded permissible limits.[5] 485 F. Supp. 566, 586 (WD Okla. 1979). An NRC official testified that he did not feel that Kerr-McGee was conforming its conduct to the "as low as reasonably achievable" standard.[6] *Ibid.* There was also some evidence that the level of plutonium in Silkwood's apartment may have exceeded that permitted in an unrestricted area such as a residence. *Ibid.*

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[5] After allowing for hold-up (plutonium which remains in the equipment after a very thorough cleanout), the inventory difference (opening less closing) for the 1972–1976 period was 4.4 kilograms. This represented 0.522% of the 842 kilograms received by Kerr-McGee during that period. The NRC permits an inventory difference of 0.5%.

[6] Federal regulations require that "persons engaged in activities under licenses issued by the Nuclear Regulatory Commission . . . make every reasonable effort to maintain radiation exposures, and releases of radioactive materials in effluents to unrestricted areas, as low as is reasonably achievable." 10 CFR § 20.1(c) (1983). In 1974, the regulation required reasonable efforts to maintain exposures and releases "as far below the limits specified [in other portions of the regulations] as practicable." The difference in the terminology is not significant. 40 Fed. Reg. 33029 (1975).

However, there was also evidence that Kerr-McGee complied with most federal regulations. The NRC official testified that there were no serious personnel exposures at the plant and that Kerr-McGee did not exceed the regulatory requirements with respect to exposure levels that would result in significant health hazards. In addition, Kerr-McGee introduced the Commission's report on the investigation of the Silkwood incident in which the Commission determined that Kerr-McGee's only violation of regulations throughout the incident was its failure to maintain a record of the dates of two urine samples submitted by Silkwood.

The trial court determined that Kerr-McGee had not shown that the contamination occurred during the course of Silkwood's employment. Accordingly, the court precluded the jury from deciding whether the personal injury claim was covered by Oklahoma's Workers' Compensation Act, which provides the sole remedy for accidental personal injuries arising in the course of employment. Okla. Stat., Tit. 85, §§ 11, 12 (1981). Instead, the court submitted the claims to the jury on alternative theories of strict liability and negligence.[7]

The court also instructed the jury with respect to punitive damages, explaining the standard by which Kerr-McGee's conduct was to be evaluated in determining whether such damages should be awarded:

> "[T]he jury may give damages for the sake of example and by way of punishment, if the jury finds the defendant or defendants have been guilty of oppression, fraud, or malice, actual or presumed. . . .
>
> "Exemplary damages are not limited to cases where there is direct evidence of fraud, malice or gross negligence. They may be allowed when there is evidence

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[7] In an effort to avoid a new trial in the event that the Court of Appeals disagreed with its ruling on the applicability of strict-liability principles, the court instructed the jury to answer a special interrogatory as to whether Kerr-McGee negligently allowed the plutonium to escape from its plant. The jury answered in the affirmative.

> of such recklessness and wanton disregard of another's rights that malice and evil intent will be inferred. If a defendant is grossly and wantonly reckless in exposing others to dangers, the law holds him to have intended the natural consequences of his acts, and treats him as guilty of a willful wrong." 485 F. Supp., at 603 (Appendix).

The jury returned a verdict in favor of Mr. Silkwood, finding actual damages of $505,000 ($500,000 for personal injuries and $5,000 for property damage) and punitive damages of $10 million. The trial court entered judgment against Kerr-McGee in that amount.

Kerr-McGee then moved for judgment n.o.v. or a new trial. In denying that motion, the court rejected Kerr-McGee's contention that compliance with federal regulations precluded an award of punitive damages. The court noted that Kerr-McGee "had a duty under part 20 of Title 10 of the Code of Federal Regulations to maintain the release of radiation 'as low as reasonably achievable.' Compliance with this standard cannot be demonstrated merely through control of escaped plutonium to within any absolute amount." *Id.*, at 585. Therefore, the court concluded, it is not "inconsistent [with any congressional design] to impose punitive damages for the escape of plutonium caused by grossly negligent, reckless and willful conduct." *Ibid.*

Kerr-McGee renewed its contentions with greater success before the Court of Appeals for the Tenth Circuit. That court, by decision of a split panel, affirmed in part and reversed in part. 667 F. 2d 908 (1981). The court first held that recovery for Silkwood's personal injuries was controlled exclusively by Oklahoma's workers' compensation law. It thus reversed the $500,000 judgment for those injuries. The court then affirmed the property damage portion of the award, holding that the workers' compensation law applied only to personal injuries and that Oklahoma law permitted an award under a theory of strict liability in the circumstances of this case. Finally, the court held that because of the federal statutes regulating the Kerr-McGee plant, "punitive damages may not be awarded in this case," *id.*, at 923.

In reaching its conclusion with respect to the punitive damages award, the Court of Appeals adopted a broad pre-emption analysis. It concluded that "any state action that competes substantially with the AEC (NRC) in its regulation of radiation hazards associated with plants handling nuclear material" was impermissible. *Ibid.* Because "[a] judicial award of exemplary damages under state law as punishment for bad practices or to deter future practices involving exposure to radiation is not less intrusive than direct legislative acts of the state," the court determined that such awards were pre-empted by federal law. *Ibid.*

Mr. Silkwood appealed, seeking review of the Court of Appeals' ruling with respect to the punitive damages award. We noted probable jurisdiction and postponed consideration of the jurisdictional issue until argument on the merits. 459 U. S. 1101 (1983).

II

We first address the jurisdictional issue. This Court is empowered to review the decision of a federal court of appeals "by appeal [if] a State statute [is] held by [the] court of appeals to be invalid as repugnant to the Constitution . . . ." 28 U. S. C. § 1254(2). Mr. Silkwood argues that because the Court of Appeals invalidated the punitive damages award on pre-emption grounds and because the basis for that award was a state statute, Okla. Stat., Tit. 23, § 9 (1981),[8] the Court of Appeals necessarily held that the state statute was unconstitutional, at least as applied in this case. Accordingly, Mr. Silkwood contends, this case falls within the confines of 28 U. S. C. § 1254(2). We disagree.

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[8] The Oklahoma statute authorizes an award of punitive damages "[i]n any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, actual or presumed."

In keeping with the policy that statutes authorizing appeals are to be strictly construed, *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 43 (1983); *Fornaris* v. *Ridge Tool Co.*, 400 U. S. 41, 42, n. 1 (1970), we have consistently distinguished between those cases in which a state statute is expressly struck down on constitutional grounds and those in which an exercise of authority under state law is invalidated without reference to the state statute. The former come within the scope of § 1254(2)'s jurisdictional grant. *Malone* v. *White Motor Corp.*, 435 U. S. 497, 499 (1978); *Dutton* v. *Evans*, 400 U. S. 74, 76, n. 6 (1970). The latter do not. *Perry Education Assn.*, *supra*, at 42; *Hanson* v. *Denckla*, 357 U. S. 235, 244 (1958); *Wilson* v. *Cook*, 327 U. S. 474, 482 (1946).[9] See also *County of Arlington* v. *United States*, 669 F. 2d 925 (CA4), cert. denied, 459 U. S. 801 (1982); *Minnesota* v. *Hoffman*, 543 F. 2d 1198 (CA8 1976), cert. denied *sub nom. Minnesota* v. *Alexander*, 430 U. S. 977 (1977). The present case falls into the second category.

The Court of Appeals held that because of the pre-emptive effect of federal law, "punitive damages may not be awarded in this case." 667 F. 2d, at 923. It did not purport to rule on the constitutionality of the Oklahoma punitive damages statute. The court did not mention the statute, and the parties did not contest or defend the constitutionality of the statute in their appellate briefs. While the award itself was struck down, the statute authorizing such awards was left untouched. Cf. *Perry Education Assn.*, 460 U. S., at 42. Therefore, the present appeal is not within our § 1254(2) appellate jurisdiction.[10]

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[9] *Wilson* and *Denckla* involve appeals from state-court judgments under 28 U. S. C. § 1257 and its predecessor. However, such cases are relevant to the present issue because of "the history of . . . close relationship between" § 1254(2) and § 1257. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 675–677, n. 11 (1974).

[10] Mr. Silkwood's reliance on *California* v. *Grace Brethren Church*, 457 U. S. 393 (1982), is misplaced. *Grace Brethren* involved a direct appeal under 28

Nevertheless, the decision below is reviewable by writ of certiorari. *Ibid.* The issue addressed by the court below is important; it affects both the States' traditional authority to provide tort remedies to their citizens and the Federal Government's express desire to maintain exclusive regulatory authority over the safety aspects of nuclear power. Accordingly, treating the jurisdictional statement as a petition for certiorari, as we are authorized to do, 28 U. S. C. § 2103, we grant the petition and reach the merits of the Court of Appeals' ruling.

III

As we recently observed in *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Comm'n*, 461 U. S. 190 (1983), state law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. *Id.*, at 203–204; *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 153 (1982); *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941). *Pacific Gas & Electric*, *supra*, at 204. Kerr-McGee contends that the award in this case is invalid under either analysis. We consider each of these contentions in turn.

U. S. C. § 1252, a statute which we have construed more broadly because of Congress' clear intent to create an "exception to the policy of minimizing the mandatory docket of this Court." *Id.*, at 405. See also *McLucas* v. *DeChamplain*, 421 U. S. 21, 31 (1975).

A

In *Pacific Gas & Electric*, an examination of the statutory scheme and legislative history of the Atomic Energy Act convinced us that "Congress . . . intended that the Federal Government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant." 461 U. S., at 205. Thus, we concluded that "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." *Id.*, at 212.

Kerr-McGee argues that our ruling in *Pacific Gas & Electric* is dispositive of the issue in this case. Noting that "regulation can be as effectively exerted through an award of damages as through some form of preventive relief," *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 247 (1959), Kerr-McGee submits that because the state-authorized award of punitive damages in this case punishes and deters conduct related to radiation hazards, it falls within the prohibited field. However, a review of the same legislative history which prompted our holding in *Pacific Gas & Electric*, coupled with an examination of Congress' actions with respect to other portions of the Atomic Energy Act, convinces us that the pre-empted field does not extend as far as Kerr-McGee would have it.

As we recounted in *Pacific Gas & Electric*, "[u]ntil 1954 . . . the use, control, and ownership of nuclear technology remained a federal monopoly." 461 U. S., at 206. In that year, Congress enacted legislation which provided for private involvement in the development of atomic energy. Atomic Energy Act of 1954, Act of Aug. 30, 1954, ch. 1073, 68 Stat. 919, as amended, 42 U. S. C. §2011 *et seq.* (1976 ed. and Supp. V). However, the Federal Government retained extensive control over the manner in which this development occurred. In particular, the Atomic Energy Commission was given "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials." *Pacific Gas & Electric, supra,* at 207. See 42 U. S. C. §§2014(e), (z), (aa), 2061–2064, 2071–2078, 2091–2099, 2111–2114 (1976 ed. and Supp. V).

In 1959 Congress amended the Atomic Energy Act in order to "clarify the respective responsibilities . . . of the States and the Commission with respect to the regulation of byproduct, source, and special nuclear materials." 42 U. S. C §2021(a)(1). See S. Rep. No. 870, 86th Cong., 1st Sess., 8–12 (1959). The Commission was authorized to turn some of its regulatory authority over to any State which would adopt a suitable regulatory program. However, the Commission was to retain exclusive regulatory authority over "the disposal of such . . . byproduct, source, or special nuclear material as the Commission determines . . . should, because of the hazards or potential hazards thereof, not be disposed of without a license from the Commission." 42 U. S. C. §2021(c)(4). The States were therefore still precluded from regulating the safety aspects of these hazardous materials.[11]

Congress' decision to prohibit the States from regulating the safety aspects of nuclear development was premised on its belief that the Commission was more qualified to determine what type of safety standards should be enacted in this complex area. As Congress was informed by the AEC, the 1959 legislation provided for continued federal control over the more hazardous materials because "the technical safety considerations are of such complexity that it is not likely that any State would be prepared to deal with them during the foreseeable future." H. R. Rep. No. 1125, 86th Cong., 1st Sess., 3 (1959). If there were nothing more, this concern over the States' inability to formulate effective standards and the foreclosure of the States from conditioning the operation of nuclear plants on compliance with state-imposed safety standards arguably would disallow resort to state-law remedies by those suffering injuries from radiation in a nuclear plant. There is, however, ample evidence that Congress had no intention of forbidding the States to provide such remedies.

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[11] At the time this suit was filed, Oklahoma had not entered into an agreement with the Commission under §2021. Even if it had, Kerr-McGee would have still been subject to exclusive NRC safety regulation because it was licensed to possess special nuclear material in a quantity sufficient to form a critical mass. See 42 U. S. C. §2021(b)(4) (1976 ed. and Supp. V).

Indeed, there is no indication that Congress even seriously considered precluding the use of such remedies either when it enacted the Atomic Energy Act in 1954 or when it amended it in 1959. This silence takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct. It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct. See *Construction Workers* v. *Laburnum Corp.*, 347 U. S. 656, 663–664 (1954).

More importantly, the only congressional discussion concerning the relationship between the Atomic Energy Act and state tort remedies indicates that Congress assumed that such remedies would be available. After the 1954 law was enacted, private companies contemplating entry into the nuclear industry expressed concern over potentially bankrupting state-law suits arising out of a nuclear incident. As a result, in 1957 Congress passed the Price-Anderson Act, an amendment to the Atomic Energy Act. Pub. L. 85–256, 71 Stat. 576. That Act established an indemnification scheme under which operators of licensed nuclear facilities could be required to obtain up to $60 million in private financial protection against such suits. The Government would then provide indemnification for the next $500 million of liability, and the resulting $560 million would be the limit of liability for any one nuclear incident.

Although the Price-Anderson Act does not apply to the present situation,[12] the discussion preceding its enactment and subsequent amendment[13] indicates that Congress assumed that persons injured by nuclear accidents were free to utilize existing state tort law remedies. The Joint Committee Report on the original version of the Price-Anderson Act explained the relationship between the Act and existing state tort law as follows:

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[12] Under the Act, the NRC is given discretion whether to require plants licensed under § 2073 to maintain financial protection. 42 U. S. C. § 2210(a). Government indemnification is available only to those required

> "Since the rights of third parties who are injured are established by State law, there is no interference with the State law until there is a likelihood that the damages exceed the amount of financial responsibility required together with the amount of the indemnity. At that point the Federal interference is limited to the prohibition of making payments through the State courts and to prorating the proceeds available." S. Rep. No. 296, 85th Cong., 1st Sess., 9 (1957).

See also H. R. Rep. No. 435, 85th Cong., 1st Sess., 9 (1957); S. Rep. No. 1605, 89th Cong., 2d Sess., 6 (1966).

Congress clearly began working on the Price-Anderson legislation with the assumption that in the absence of some subsequent legislative action, state tort law would apply.[14] This was true even though Congress was fully aware of the

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to maintain financial protection, § 2210(c), and certain others not relevant here, § 2014(t), and the liability limitation applies only to those who are indemnified. § 2210(e). The NRC did not require plutonium processing plants to maintain financial protection until 1977, 42 Fed. Reg. 46 (1977).

[13] The 1957 version of the Price-Anderson Act was designed to expire in 1967. It was extended in 1965, Pub. L. 89-210, 79 Stat. 855, and again in 1975, Pub. L. 94-197, 89 Stat. 1111. In addition, several substantive changes were made through the years, most notably in 1966. Pub. L. 89-645, 80 Stat. 891.

[14] In sustaining the Price-Anderson Act against a constitutional challenge, we echoed that assumption, noting that before the Act was enacted the only right possessed by those injured in a nuclear incident "was to utilize their existing common-law and state-law remedies to vindicate any particular harm visited on them from whatever source." *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 88, 89, n. 32 (1978).

Commission's exclusive regulatory authority over safety matters. As the Joint Committee explained in 1965:

> "The Price-Anderson Act also contained provisions to improve the AEC's procedures for regulating reactor licensees . . . . This manifested the continuing concern of the Joint Committee and Congress with the necessity for assuring the effectiveness of the national regulatory program for protecting the health and safety of employees and the public against atomic energy hazards. The inclusion of these provisions . . . also reflected the intimate relationship which existed between Congress' concern for prevention of reactor accidents and the indemnity provisions of the Price-Anderson legislation." S. Rep. No. 650, 89th Cong., 1st Sess., 4–5 (1965).

When it enacted the Price-Anderson Act, Congress was well aware of the need for effective national safety regulation. In fact, it intended to encourage such regulation. But, at the same time, "the right of the State courts to establish the liability of the persons involved in the normal way [was] maintained." S. Rep. No. 296, *supra*, at 22.

The belief that the NRC's exclusive authority to set safety standards did not foreclose the use of state tort remedies was reaffirmed when the Price-Anderson Act was amended in 1966. The 1966 amendment was designed to respond to concerns about the adequacy of state-law remedies. See, *e. g.*, S. Rep. No. 650, *supra*, at 13. It provided that in the event of an "extraordinary nuclear occurrence,"[15] licensees could be required to waive any issue of fault, any charitable or governmental immunity defense, and any statute of limitations defense of less than 10 years. 42 U. S. C. § 2210(n)(1). Again, however, the importance of the legislation for present purposes is not so much in its substance, as in the assumptions on which it was based.

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[15] An "extraordinary nuclear occurrence" is "any event causing a discharge or dispersal of source, special nuclear, or byproduct material from its intended place of confinement in amounts offsite, or causing radiation levels offsite, which the Commission determines to be substantial, and which the Commission determines has resulted or will probably result in substantial damages to persons offsite or property offsite." 42 U. S. C. § 2014(j). The Commission's criteria for defining an extraordinary nuclear occurrence are located at 10 CFR §§ 140.81–140.85 (1983).

Describing the effect of the 1966 amendment, the Joint Committee stated:

> "By requiring potential defendants to agree to waive defenses the defendants' rights are restricted; concomitantly, to this extent, the rights of plaintiffs are enlarged. Just as the rights of persons who are injured are established by State law, the rights of defendants against whom liability is asserted are fixed by State law. What this subsection does is to authorize the [NRC] to require that defendants covered by financial protection and indemnity give up some of the rights they might otherwise assert." S. Rep. No. 1605, 89th Cong., 2d Sess., 26 (1966).

Similarly, when the Committee outlined the rights of those injured in nuclear incidents which were not extraordinary nuclear occurrences, its reference point was again state law. "Absent . . . a determination [that the incident is an "extraordinary nuclear occurrence"], a claimant would have exactly the same rights that he has today under existing law—including, perhaps, benefit of a rule of strict liability if applicable State law so provides." *Id.*, at 12. Indeed, the entire discussion surrounding the 1966 amendment was premised on the assumption that state remedies were available notwithstanding the NRC's exclusive regulatory authority. For example, the Committee rejected a suggestion that it adopt a federal tort to replace existing state remedies, noting that such displacement of state remedies would engender great opposition. Hearings before the Joint Committee on Atomic Energy on Proposed Amendments to Price-Anderson Act Relating to Waiver of Defenses, 89th Cong., 2d Sess., 31, 75 (1966); S. Rep. No. 1605, *supra*, at 6–9. If other provisions of the Atomic Energy Act already precluded the States from providing remedies to its citizens, there would have been no need for such concerns. Other comments made throughout the discussion were similarly based on the assumption that state remedies were available.[16]

Kerr-McGee focuses on the differences between compensatory and punitive damages awards and asserts that, at most, Congress intended to allow the former. This argument, however, is misdirected because our inquiry is not whether Congress expressly allowed punitive damages awards. Punitive damages have long been a part of traditional state tort law. As we noted above, Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted. Thus, it is Kerr-McGee's burden to show that Congress intended to preclude such awards. See *Electrical Workers* v. *Foust*, 442 U. S. 42, 53 (1979) (BLACKMUN, J., concurring in result). Yet, the company is unable to point to anything in the legislative history or in the regulations that indicates that punitive damages were not to be allowed. To the contrary, the regulations issued implementing the insurance provisions of the Price-Anderson Act themselves contemplate that punitive damages might be awarded under state law.[17]

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[16] Atomic Energy Commission General Counsel Hennessey testified that "[i]t would appear eminently reasonable to avoid disturbing ordinary tort law remedies with respect to damage claims where the circumstances are not substantially different from those encountered in many activities of life which cause damage to persons and property." Hearings before the Joint Committee on Atomic Energy on Proposed Amendments to Price-Anderson Act Relating to Waiver of Defenses, 89th Cong., 2d Sess., 35 (1966).

See also *id.*, at 41 ("the amendments would not actually change the structure of the tort laws of the various states. The legal principles of state law would remain unchanged, but certain of the issues and defenses . . . would be affected").

[17] Following the 1966 amendment, the Commission published a form for nuclear energy liability policies and indemnity agreements. After reciting the waivers being made by the licensee in the event of an extraordinary nuclear occurrence, the form contains the following provision: "The waiv-

In sum, it is clear that in enacting and amending the Price-Anderson Act, Congress assumed that state-law remedies, in whatever form they might take, were available to those injured by nuclear incidents. This was so even though it was well aware of the NRC's exclusive authority to regulate safety matters. No doubt there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages based on its own law of liability. But as we understand what was done over the years in the legislation concerning nuclear energy, Congress intended to stand by both concepts and to tolerate whatever tension there was between them. We can do no less. It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards, but that regulatory consequence was something that Congress was quite willing to accept.

We do not suggest that there could never be an instance in which the federal law would pre-empt the recovery of damages based on state law. But insofar as damages for radiation injuries are concerned, pre-emption should not be judged on the basis that the Federal Government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law. We perceive no such conflict or frustration in the circumstances of this case.

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ers set forth . . . above do not apply to . . . [a]ny claim for punitive or exemplary damages . . . ." 10 CFR § 140.91, Appendix A, ¶ 2(c), p. 801 (1983).

Had the Commission thought that punitive damages awards were precluded by earlier legislation, as Kerr-McGee suggests, there would have been no need to state that the waivers did not apply to such awards. Since the waivers do not apply at all to the present situation, the clear implication is that punitive damages are available, if state law so provides.

B

The United States, as *amicus curiae*, contends that the award of punitive damages in this case is pre-empted because it conflicts with the federal remedial scheme, noting that the NRC is authorized to impose civil penalties on licensees when federal standards have been violated. 42 U. S. C. §2282 (1976 ed. and Supp. V). However, the award of punitive damages in the present case does not conflict with that scheme. Paying both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible. Nor does exposure to punitive damages frustrate any purpose of the federal remedial scheme.

Kerr-McGee contends that the award is pre-empted because it frustrates Congress' express desire "to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes." 42 U. S. C. §2013(d). In *Pacific Gas & Electric*, we observed that "[t]here is little doubt that a primary purpose of the Atomic Energy Act was, and continues to be, the promotion of nuclear power." 461 U. S., at 221. However, we also observed that "the promotion of nuclear power is not to be accomplished 'at all costs.'" *Id.*, at 222. Indeed, the provision cited by Kerr-McGee goes on to state that atomic energy should be developed and utilized only to the extent it is consistent "with the health and safety of the public." 42 U. S. C. §2013(d). Congress therefore disclaimed any interest in promoting the development and utilization of atomic energy by means that fail to provide adequate remedies for those who are injured by exposure to hazardous nuclear materials. Thus, the award of punitive damages in this case does not hinder the accomplishment of the purpose stated in §2013(d).

We also reject Kerr-McGee's submission that the punitive damages award in this case conflicts with Congress' express intent to preclude dual regulation of radiation hazards. See S. Rep. No. 870, 86th Cong., 1st Sess., 8 (1959). As we explained in Part A, Congress did not believe that it was inconsistent to vest the NRC with exclusive regulatory authority over the safety aspects of nuclear development while at the same time allowing plaintiffs like Mr. Silkwood to recover for injuries caused by nuclear hazards. We are not authorized to second-guess that conclusion.[18]

IV

We conclude that the award of punitive damages in this case is not pre-empted by federal law. On remand Kerr-McGee is free to reassert any claims it made before the Court of Appeals which were not addressed by that court or by this opinion, including its contention that the jury's findings with respect to punitive damages were not supported by sufficient evidence and its argument that the amount of the punitive damages award was excessive. The judgment of the Court of Appeals with respect to punitive damages is therefore reversed, and the case is remanded to that court for proceedings consistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL joins, dissenting.

I join JUSTICE POWELL's opinion in dissent and add comments of my own that, I believe, demonstrate (a) the incompatibility between the Court's opinion last Term in *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Comm'n*, 461 U. S. 190 (1983), and its opinion in the present case, and (b) the fact that the Court is by no means compelled to reach the result it espouses today.

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[18] The Government cites no evidence to support its claim that the present award conflicts with the NRC's desire to avoid penalties which put "a licensee out of business . . . or adversely affec[t] a licensee's ability to safely conduct licensed activities." 47 Fed. Reg. 9991 (1982). Thus, we need not decide whether an award could be so large as to conflict with that policy. Of course, Kerr-McGee is free to challenge the propriety of the amount of the award on remand. See text *infra*, this page.

JUSTICE POWELL's dissent well explains the fundamental incongruity of the Court's result. The Court acknowledges that Congress pre-empted state regulation of safety aspects of nuclear operations largely out of concern that States were without the technological expertise necessary to regulate them. *Ante*, at 250–251. Yet the Court concludes that Congress intended to allow a jury to impose substantial penalties upon a nuclear licensee for failure to follow what the jury regards as adequate safety procedures. The Court recognizes the paradox of its disposition, but blames the irrationality on Congress. Then, with humility, the Court explains that it is duty-bound to follow the dictates of Congress. But such institutional modesty cannot transfer the blame for the tension that today's decision injects into the regulation of nuclear power. The Court, in my view, tortures its earlier decisions and, more importantly, wreaks havoc with the regulatory structure that Congress carefully created.

I

The Court recognizes that the analytic framework for this case was established less than a year ago in *Pacific Gas*. The precise issue in that case was whether the 1954 Atomic Energy Act, 68 Stat. 921, as amended, 42 U. S. C. § 2011 *et seq.* (1976 ed. and Supp. V), pre-empted California's authority to condition the construction of a nuclear facility in California on the State's finding that adequate means of disposal were available for the plant's nuclear wastes. Two aspects of that decision control the proper disposition of the case today.

First, the Court concluded that federal pre-emption of nuclear safety regulation was full and complete:

> "State safety regulation is not pre-empted only when it conflicts with federal law. Rather, the Federal Govern-

> ment has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States. When the Federal Government completely occupies a given field or an identifiable portion of it, as it has done here, the test of pre-emption is whether 'the matter on which the State asserts the right to act is in any way regulated by the Federal Act,'" 461 U. S., at 212–213 (footnote omitted).

The second important aspect of *Pacific Gas* was its analysis of the California statute. Despite the broad federal pre-emption of nuclear safety concerns, the Court *upheld* the state statute. The Court recognized that the statute clearly had an effect on the safety of nuclear plant operations, *id.*, at 196–197, but it upheld the statute because its *purpose* was economic. The Court concluded that the State had adopted the regulation to prevent investments in powerplants that were likely to become white elephants due to inadequate nuclear waste storage facilities. *Ibid.* Because Congress had not meant the Atomic Energy Act to deprive States of the right to make economic decisions concerning nuclear power, the Court concluded that the regulation was not pre-empted. Thus, the fundamental teaching of *Pacific Gas* is that state regulation of nuclear power *is* pre-empted to the extent that its purpose is to regulate safety.

The principles set forth in *Pacific Gas* compel the conclusion that the punitive damages awarded in this case, and now upheld, are pre-empted. The prospect of paying a large fine—in this case a potential $10 million—for failure to operate a nuclear facility in a particular manner has an obvious effect on the safety precautions that nuclear licensees will follow. The Court does not dispute, moreover, that punitive damages are expressly designed for this purpose. Punitive damages are "private fines levied by civil juries." *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 350 (1974). See *Smith* v. *Wade*, 461 U. S. 30, 49 (1983) ("[D]eterrence of future egregious conduct is a primary purpose . . . of punitive damages"). The trial court's instructions to the jury in this case explained the purpose of punitive damages:

> "The basis for allowance of punitive damages rests upon the principle that they are allowed as a punishment to the offender for the general benefit of society, both as a restraint upon the transgressor and as a warning and example to deter the commission of like offenses in the future." App. to Juris. Statement 112a.

The conduct that the jury's punitive damages award sought to regulate was the day-to-day safety procedures of nuclear licensees. There was no factual finding as to how the contamination of Karen Silkwood occurred; the trial judge expressly refused to give an instruction on intentional infliction, and the jury rejected Kerr-McGee's suggestion that Silkwood intentionally contaminated herself. See *ante*, at 243; 667 F. 2d 908, 915 (CA10 1981). It is abundantly clear, therefore, that the punitive damages award in this case deters a nuclear facility from operating in the same manner as Kerr-McGee. Authority for a State to do so, however, is precisely what the Court held to be pre-empted in *Pacific Gas*.[1] Nuclear Regulatory Commission regulations covered virtually every aspect of the incident in which Silkwood was contaminated.[2] The

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[1] The Court's opinion in *Pacific Gas* seemed to contemplate even the precise issue in the case today. The Court explained:

"It would clearly be impermissible for California to attempt to [regulate the construction or operation of a nuclear powerplant], for such regulation, even if enacted out of nonsafety concerns, would nevertheless directly conflict with the [Commission's] exclusive authority over plant construction and operation." 461 U. S., at 212.

[2] See, *e. g.*, 10 CFR § 19.12 (1974) (requiring education of workers concerning hazards of radiation); §§ 20.101–20.108 and Appendix B (radiation dose standards for individuals both in and outside restricted areas); § 20.202 (use of personnel-monitoring equipment); § 20.203 (posting of warnings around radiation areas); § 20.402 (notification of the Commission in the event of loss or theft of nuclear materials); § 403 (notification in the

Atomic Energy Act provides a full enforcement arsenal—including criminal sanctions—to police compliance with federal standards.[3] Indeed, the Commission conducted a complete investigation into the Silkwood contamination, and found no material violation of federal regulations that could justify imposing a fine.[4] The District Court nevertheless instructed the jury to fashion a fine to encourage Kerr-McGee and other nuclear licensees to meet in the future whatever safety standard the jury considered appropriate for plutonium.[5]

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event of exposure to radiation). Part 70 of the Regulations sets forth certain terms and conditions imposed on nuclear licenses. See, *e. g.*, §§ 70.23, 70.24, 73.1 (license applicants must be determined to have qualified personnel, equipment, and procedures adequate to protect health and safety and to protect the plant against theft or sabotage of nuclear materials); §§ 70.51, 70.53 (nuclear balance inventory and recordkeeping for special nuclear materials).

[3] 42 U. S. C. §§ 2271–2284 (1976 ed. and Supp. V). Criminal conviction for willful violations of various provisions of the Act may result in substantial fines and imprisonment. §§ 2272–2278b, 2284. The Attorney General may seek injunctive relief to prevent or stop violations of the Act or the Commission regulations or orders. § 2280. The Commission itself can impose civil penalties for violations of specific licensing provisions of the Act. § 2282. In 1980, Congress increased the maximum civil penalty to $100,000 per violation; if the violation is a continuing one, each day constitutes a separate violation. § 2282(a). Finally, the Commission can initiate proceedings to modify, suspend, or revoke any license issued under the Act, and, in an emergency, can make such action effective immediately. 10 CFR §§ 70.61–70.62 (1974).

[4] The only violations of regulations revealed by the investigation were Kerr-McGee's failure to record the voiding dates for two bioassay samples provided by Silkwood. App. to Motion to Dismiss or Affirm A17.

[5] The regulatory nature of the punitive damages award is evidenced by the jury instruction explaining how punitive damages were to be calculated:

"You may consider the financial worth of the defendant against whom such damages are awarded in determining the size of such an award that is proper under the facts of this case. That is, you may consider the wealth of defendant Kerr-McGee Nuclear Corporation in determining what amount of exemplary damages, if you find them appropriate, is consistent

The $10 million fine that the jury imposed is 100 times greater than the maximum fine that may be imposed by the Nuclear Regulatory Commission for a single violation of federal standards. The fine apparently is more than 10 times greater than the largest single fine that the Commission has ever imposed.[6] The complete federal occupation of safety regulation compels the conclusion that such an award is pre-empted.

It is to be noted, of course, that the same pre-emption analysis produces the opposite conclusion when applied to an award of compensatory damages. It is true that the prospect of compensating victims of nuclear accidents will affect a licensee's safety calculus. Compensatory damages therefore have an indirect impact on daily operations of a nuclear facility. But so did the state statute upheld in *Pacific Gas*. The crucial distinction between compensatory and punitive damages is that the purpose of punitive damages is to regulate safety, whereas the purpose of compensatory damages is to compensate victims. Because the Federal Government does not regulate the compensation of victims, and because it is inconceivable that Congress intended to leave victims with no remedy at all,[7] the pre-emption analysis established by

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with the general purpose of such an award in deterring the defendant, and others like it, from committing similar acts in the future, and for punishment of the defendant for such acts." App. to Juris. Statement 113a. The jury was instructed further that compliance with federal standards was not a complete defense to the award of punitive damages:

"You are instructed, however, that you are not bound by these standards. Your duty is to determine what constitutes the exercise of reasonable care in handling plutonium, or the existence of reckless and wanton conduct, in light of the physical characteristics of that material and the risks associated with it." *Id.*, at 102a.

[6] See N. Y. Times, Oct. 22, 1983, p. 26, col. 5 (largest fine imposed to date is $850,000).

[7] In *Pacific Gas*, the Court relied on the fact that there was no federal regulation of the economic considerations of nuclear power as clear evi-

Pacific Gas comfortably accommodates—indeed it compels—the conclusion that compensatory damages are not preempted whereas punitive damages are.

Differences in the means of calculating compensatory and punitive damages further distinguish the two, and highlight the fundamental incompatibility of punitive damages and federal standards. When a victim is determined to be eligible for a compensatory award, that award is calculated by reference to the victim's injury. Whatever compensation standard a State imposes, whether it be negligence or strict liability, a licensee remains free to continue operating under federal standards and to pay for the injury that results. This presumably is what Congress had in mind when it preempted state authority to set administrative regulatory standards but left state compensatory schemes intact. Congress intended to rely solely on federal expertise in setting safety standards, and to rely on States and juries to remedy whatever injury takes place under the exclusive federal regulatory scheme. Compensatory damages therefore complement the federal regulatory standards, and are an implicit part of the federal regulatory scheme.

Punitive damages, in contrast, are calculated to compel adherence to a particular standard of safety—and it need not be a federal standard. In setting the punitive damages award in this case, the court instructed the jury to consider "the financial worth of the defendant" and award an "amount of ex-

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dence that Congress intended to leave such concerns to consideration of the States:

"The Nuclear Regulatory Commission . . . does not purport to exercise its authority based on economic considerations . . . . It is almost inconceivable that Congress would have left a regulatory vacuum; the only reasonable inference is that Congress intended the States to make these judgments." 461 U. S., at 207–208.

The absence of federal regulation governing the compensation of victims of nuclear accidents is strong evidence that Congress intended the matter to be left to the States.

emplary damages . . . consistent with the general purpose of such an award in deterring the defendant, and others like it, from committing similar acts in the future." 485 F. Supp. 566, 603 (WD Okla. 1979). The punitive damages award therefore enables a State to enforce a standard that is more exacting than the federal standard. Were Kerr-McGee to continue adherence only to the federal standard, it would presumably be in continuous violation of state law—an indication that the jury award in this case was too small to serve its purpose. A licensee that continues to meet only the federal standard therefore presumably will receive increasingly large punitive sanctions in subsequent personal injury suits, until compliance with the state-imposed safety standard is obtained. At that point, of course, the federal safety standard will have been entirely supplanted. It is incredible to suggest that Congress intended the Federal Government to have the sole authority to set safety regulations, but left intact the authority of States to require adherence to a different state standard through the imposition of jury fines. The obvious conflict shows that punitive damages are pre-empted.

This pre-emption analysis eliminates the "tension" that the Court concedes its disposition creates. It remains faithful to the Federal Government's expressed desire to balance the conflict between promoting nuclear power and ensuring safe operation of nuclear plants. See *Power Reactor Co.* v. *Electricians*, 367 U. S. 396, 404 (1961) ("the responsibility for safeguarding [public] health and safety belongs under the statute to the Commission"). It preserves the ability of States to provide compensation to their citizens for injuries caused by radiation hazards. Finally, it avoids the anomaly of a jury's imposing a fine to regulate activity considered too complicated for state regulatory experts. See H. R. Rep. No. 1125, 86th Cong., 1st Sess., 3 (1959) ("the technical safety considerations are of such complexity that it is not likely that any State would be prepared to deal with them during the foreseeable future").

II

For reasons never expressed in its opinion, the Court rejects the analysis outlined above and opts instead for one that it admits creates "tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages based on its own law of liability." *Ante*, at 256. But, with all respect, in struggling to reach its result, the Court never focuses on the issue in this case. Without explanation, the analysis proceeds as though the issue is whether a victim in a nuclear accident can seek judicial recourse for her injuries. That issue is not in dispute. The issue in this case is not whether a victim of radiation hazards can be compensated under state law. The issue is whether the jury can impose a fine on a nuclear operator in addition to whatever compensatory award is given.

The Court's obfuscation of the issue appears at the outset of its pre-emption analysis, where it states rhetorically:

> "[T]here is no indication that Congress even seriously considered precluding the use of [state-law] remedies either when it enacted the Atomic Energy Act in 1954 and or when it amended it in 1959. This silence takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct. It is difficult to believe that Congress would, without comment, *remove all means of judicial recourse for those injured by illegal conduct.*" *Ante*, at 251 (emphasis supplied).

In this passage, the Court responds to an argument that has not been made. Respondents have not attributed to Congress a callous intent to deprive injured victims of compensation. *Pacific Gas* does not imply anything so heartless. Yet the Court's analysis never focuses on the real issue; its entire analysis proceeds as if pre-emption of punitive damages would require pre-emption of compensatory damages as well.

The source of the confusion appears to be an argument by petitioner (formerly appellant) that a pre-emption analysis of punitive damages and compensatory damages must lead to the same result on the ground that both have a regulatory *effect.*[8] Petitioner thus placed before the Court the bleak—though contrived—choice either to allow punitive damages or to deprive injured victims of "all judicial recourse" for their injuries. As pointed out above, there is no reason that similar treatment of punitive and compensatory damages is required; indeed, *Pacific Gas* requires that a distinction between the two be drawn.

The irony of the Court's approach is that *Pacific Gas*, decided less than a year ago, drew precisely the line that the Court today is unable to find. *Pacific Gas* made clear that the purpose of a statute is critical in a pre-emption analysis under the Atomic Energy Act. In that case, moreover, the parties were in serious dispute over whether the statute in question was motivated out of safety or nonsafety concerns. In this case, in contrast, there is no disagreement on the dispositive issue; the Court does not dispute that punitive damages are intended to make a nuclear operator adopt better safety procedures.

Petitioner seems also to have obscured the distinction between compensatory and punitive damages by focusing on the role of a jury in awarding compensatory damages in a State, such as Oklahoma, where compensation is allowed only on a showing of negligence.[9] Because a determination of negligence requires a jury to determine a licensee's duty of care, petitioner argued that Congress has demonstrated a willingness to allow a jury to set a standard for licensee conduct. That being the case, petitioner suggested that there is no evidence that Congress intended not to allow a jury to impose a punitive award based on that standard.

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[8] See Brief for Appellant 42–43; Reply Brief for Appellant 6–9.

[9] See *id.*, at 11–12.

It is not at all surprising, however, that Congress would tolerate a jury-imposed negligence standard for awarding compensation. In its desire to promote nuclear power, Congress has never expressed an intention to allow a nuclear licensee to avoid paying for any injury it causes. Indeed, where Congress has determined the liability standard for licensees, it has imposed strict liability.[10] Congress thus has demonstrated its willingness to hold a nuclear licensee liable for all injury that it causes, regardless of whether it is at fault. When a State chooses to impose a *more relaxed* liability standard on a licensee—such as negligence—the State simply eliminates part of the burden that the Federal Government is willing to have the nuclear industry bear. In effect, a State that uses a negligence standard simply subsidizes the industry at the expense of those numbers of its citizenry that are victims of radiation hazards. The fact that Congress was willing to let States *reduce* the compensatory liability of licensees is hardly support for the notion that Congress would also allow States to set—either through administrative regulation or tort law—standards of care

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[10] The Price-Anderson Act, Pub. L. 85–256, 71 Stat. 576, was amended in 1966 to remedy what Congress perceived to be state tort law inadequacies in administering compensation for a victim of a major nuclear incident. Pub. L. 89–645, 80 Stat. 891. Those amendments require licensees, as a condition of their receiving approval of financial protection and the indemnity afforded by Price-Anderson, to waive certain state-law defenses in the event of a major nuclear incident. See 42 U. S. C. § 2210(n)(1). The waivers assure, *inter alia*, that a victim's entitlement to compensation will be determined under a strict-liability standard rather than negligence. Congress required such waivers out of concern that state laws, such as the negligence standard of liability, were ill-suited to the problems of nuclear hazards. See S. Rep. No. 1605, 89th Cong., 2nd Sess., 13 (1966).

higher than the federal standard, and impose fines to secure compliance with them.

Having focused on the wrong issue, the Court seeks to support its wrong result by focusing on the legislative history of the wrong statute. The Court relies heavily on comments made during consideration of the Price-Anderson Act, Pub. L. 85–256, 71 Stat. 576. Congress enacted that statute in 1957 out of concern that the potential liability arising from a nuclear occurrence exceeded the amount of insurance a licensee could obtain. Congress perceived that the unavailability of unlimited insurance was deterring private investment in nuclear energy projects. Price-Anderson therefore established a liability system to compensate victims in the event of an "extraordinary nuclear occurrence." The system has three major components: (1) it empowers the Commission to require a licensee to have financial protection up to $60 million of liability; (2) it provides for federal indemnification for the next $500 million; and (3) it sets the $560 million thus aggregated as the limit of liability for any one nuclear incident (with a procedure for apportioning that amount should claims arising from the incident exceed $560 million). After that limit, any additional compensation to victims would require further action by Congress. Price-Anderson also requires a licensee to waive certain defenses that, most importantly, make clear that in the event of an "extraordinary nuclear occurrence," the licensee will be strictly liable for the injuries it causes.

Price-Anderson's legislative history plainly demonstrates that except in the event of an extraordinary nuclear occurrence, Price-Anderson does not interfere with state tort law. For example, the Joint Committee Report on the bill that later became Price-Anderson explained:

> "The basic principles *underlying the bill* are two:
>
> "1. Since the rights of third parties who are injured are established by State law, there is no interference

> with the State law until there is a likelihood that the damages exceed the amount of financial responsibility required together with the amount of the indemnity [*i. e.*, $560 million]. At that point the Federal interference is limited to the prohibition of making payments through the State courts and to prorating the proceeds available.
>
> "2. . . . ." S. Rep. No. 296, 85th Cong., 1st Sess., 9 (1957) (emphasis added).

The Court relies on this passage to demonstrate, in its view, that the entire corpus of "state tort law" is available for application in any suit arising out of a nuclear incident. *Ante*, at 252–254. Such an interpretation simply ignores the context of the statement, and produces a variety of incongruities that the Court fails to address.

The Court's opinion omits from its quotation the first line of the passage. That line makes clear that the passage describes only the underlying principles of the Price-Anderson Act; it does not purport to be a description of the relationship between all federal nuclear regulation and state tort law. The passage demonstrates that Price-Anderson interferes with state tort law only in certain limited situations. But the question in this case is not whether Price-Anderson pre-empted punitive damages; the issue is whether the Atomic Energy Act pre-empted punitive damages in 1954. Thus, the legislative history on which the Court bases its argument simply begs the question of how much state tort law remained in place before Price-Anderson was enacted.

It is hardly surprising, moreover, that proponents of Price-Anderson emphasized how little their proposed legislation would interfere with state tort law. As with any federal legislation that pre-empts the powers of the States, Price-Anderson undoubtedly prompted concern about federal intrusiveness. To assuage such concerns, proponents of Price-Anderson and later federal statutes regulating nuclear power emphasized the minimal federal intrusion of the proposed legislation.[11] But such statements provide a most uncertain basis on which to interpret the pre-emption that resulted from earlier federal statutes. On the relevant issue—the pre-emption of state law accomplished by the Atomic Energy Act in 1954—this Court already has concluded that the pre-emption of nuclear safety concerns was complete.

By using Price-Anderson's legislative history in 1957 to conclude that the 1954 Act leaves all of state tort law intact, the Court implicitly proves too much. Surely the Court would concede that Congress did not intend, for example, to allow a state court to entertain a nuisance action and enjoin the operation of a nuclear powerplant on the ground that the plant was unsafe. Similarly, the Court must agree that a state court could not enjoin in a trespass action the release of effluents from a plant that was in compliance with Commission standards. Yet the Court's position rests on the notion that state tort law must be treated as an undifferentiated body of law, and that all tort remedies have been left intact.

The Court's interpretation of Price-Anderson's legislative history produces even greater incongruities in the operation of Price-Anderson itself. As explained above, the Price-Anderson liability scheme provides federal indemnification for liability above $60 million and below $560 million. The purpose of the indemnification is to provide compensation for victims and to minimize the exposure of nuclear licensees. But the Court's inconsonant holding leads to the anomalous result that in the event of a nuclear accident in which liability exceeds $60 million, the *Federal Government* might well have to pay *punitive* damages to the victims of the accident. By definition, such payments would not serve a compensatory purpose; nor would they have the deterrent effect on licensees that justifies imposing them. Congress could not have intended so paradoxical a result.

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[11] See, *e. g.*, H. R. Rep. No. 435, 85th Cong., 1st Sess., 9 (1957); S. Rep. No. 1605, 89th Cong., 2d Sess., 5 (1966).

Once again, the logical way out of this paradox is a conclusion that Congress assumed that punitive damages would not be awarded under Price-Anderson.[12] But such an assumption is now unavailable to the Court: the same passages the Court uses to demonstrate that "there is no interference with . . . State law" except in the event of a nuclear occurrence also make clear that even then the "Federal interference is limited to the prohibition of making payments through the state courts and to prorating the proceeds available." Accordingly, it is clear that Price-Anderson itself would not pre-empt punitive damages, and the Court's position puts the Federal Government in the absurd position of paying them.

The Court's holding produces similar incongruities in the application of Price-Anderson to an accident in which liability exceeds the $560 million limit. In that situation, Price-Anderson provides for the prorating of claims. If punitive damages are allowed, victims with large punitive awards would receive awards greatly in excess of compensation, while other victims would receive less than full compensation. Such a result would be grossly inequitable, and in clear conflict with Price-Anderson's goal of compensating victims of a nuclear accident. Once again, the obvious implication of this result is that Congress assumed that punitive damages would not be available. Yet the Court rejects this assumption by insisting that references to "state tort law" in the legislative history demonstrate that punitive damages have never been pre-empted.

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[12] Such an assumption is fully consistent with the legislative history of the Act which, when read in context, makes clear that its objective is to provide compensation to persons that suffer injuries. See, *e. g.*, S. Rep. No. 296, 85th Cong., 1st Sess., 8 (1957) (Price-Anderson offers "a practical approach to the necessity of providing adequate protection against liability arising from atomic hazards as well as a sound basis for *compensating the public for any possible injury or damage arising from such hazards*") (emphasis supplied).

III

The Court's analysis ends where it began, still focused on the wrong issue. In the last paragraph of its analysis,[13] the opinion once again acknowledges the anomaly of its disposition, but explains:

> "Congress did not believe that it was inconsistent to vest the NRC with exclusive regulatory authority over the safety aspects of nuclear development while at the same time allowing plaintiffs like Mr. Silkwood to *recover for injuries caused by nuclear hazards.* We are not authorized to second-guess that conclusion" (emphasis supplied). *Ante,* at 258.

Not only are we not authorized to second-guess Congress' conclusion, but also we have not been asked to do so. At the risk of repetition, this case is not about whether Karen Silkwood's administrator can recover for her injury; it is about whether a person injured by radiation can be awarded an amount in excess of the injury sustained in order to encourage all nuclear operators to spend more on safety. On that issue, the Court's position is plainly inconsistent with its earlier holding in *Pacific Gas* that "the Federal Government has occupied the entire field of nuclear safety concerns." 461 U. S., at 212. The Court's insistence on obfuscating the issue in this case cannot change the will of Congress on the issue that is truly before us.

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[13] The next to last paragraph of the analysis seems to reflect similar confusion. The paragraph is an attempt to respond to respondents' argument that punitive damages conflict with the desire of Congress to promote nuclear power. The Court explains:

"Congress . . . disclaimed any interest in promoting the development and utilization of atomic energy by means that fail to provide adequate *remedies for those who are injured by exposure to hazardous nuclear materials.* Thus, the award of punitive damages in this case does not hinder the accomplishment of the [congressional] purpose . . . ." *Ante,* at 257 (emphasis supplied).

There is no claim in this case that Congress pre-empted remedies to compensate those who are injured by exposure to hazardous nuclear materials. Unless the statement is meant to suggest that remedies are not "adequate" unless they include punitive damages—an argument which the Court does not put forward and which would be difficult to make, given that some States do not allow punitive damages—then the statement has little relevance to the issue in this case.

JUSTICE POWELL, with whom THE CHIEF JUSTICE, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

The Court's decision, in effect, authorizes lay juries and judges in each of the States to make regulatory judgments as to whether a federally licensed nuclear facility is being operated safely. Such judgments then become the predicate to imposing heavy punitive damages. This authority is approved in this case even though the Nuclear Regulatory Commission (NRC) (then the Atomic Energy Commission) (AEC)—the agency authorized by Congress to assure the safety of nuclear facilities—found no relevant violation of its stringent safety requirements worthy of punishment. The decision today also comes less than a year after we explicitly held that federal law has "pre-empted" all "state safety regulation" except certain limited powers "expressly ceded to the States." *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Comm'n*, 461 U. S. 190, 212 (1983).[1] There is no express authorization in federal law of the authority the Court today finds in a State's common law of torts.

Punitive damages, unrelated to compensation for any injury or damage sustained by a plaintiff, are "regulatory" in nature rather than compensatory. The Court of Appeals for the Tenth Circuit so found in this case—prior even to our decision in *Pacific Gas & Electric Co.* 667 F. 2d 908, 922 (1981). It also concluded that punitive damages are "no less intrusive than direct legislative acts of the state." *Id.*, at 923; see *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 247 (1959). I agree with the Court of Appeals.

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[1] In *Pacific Gas & Electric Co.*, we held:

"State safety regulation is not pre-empted only when it conflicts with federal law. Rather, the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States. When the Federal Government completely occupies a given field or an identifiable portion of it, as it has done here, the test of pre-emption is whether 'the matter on which the State asserts the right to act is in any way regulated by the Federal Act'." 461 U. S., at 212–213.

I

The facts are instructive. During a 3-day period in November 1974, Karen Silkwood was contaminated by plutonium from one of respondent Kerr-McGee's plants that had been built and was operated pursuant to federal law and subject to extensive regulation by the AEC. Silkwood was absent from her job for only a week—from November 7 until she returned to work on November 13. That night she was killed—as the Court states—"in an unrelated automobile accident." *Ante*, at 242. There is no evidence that Silkwood suffered any specific injury,[2] temporary or permanent, other than mental distress for a short period. In a state-law tort action against Kerr-McGee brought by Silkwood's father, the jury awarded "actual damages" of $505,000 and "punitive damages" of $10 million. The District Court entered judgment on the verdict.

Where injury is sustained as a result of the operation of a nuclear facility, it is not contested that *compensatory* damages under state law properly may be awarded. Rather, in view of the purpose and effect of *punitive* damages, the question is whether such damages may be imposed not to compensate the injured citizen or her family but solely to punish and deter conduct at the nuclear facility.[3]

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[2] The autopsy after Ms. Silkwood's death indicated that her body contained 8.8 nanocuries of plutonium. AEC regulations specified that the permissible body burden of plutonium for employees of nuclear facilities was 40 nanocuries. Disagreeing with the AEC, an expert witness for petitioner speculated at trial that the amount of plutonium contamination Ms. Silkwood experienced might have manifested itself in the form of lung cancer and chromosome damage at some future date.

A

The purpose of a punitive damages award was made clear by the District Court's instructions. The jury was authorized to impose such damages to "punish"

> "the offender for the general benefit of society, both as a restraint upon the transgressor and as a warning and example to deter the commission of like offenses in the future." 585 F. Supp. 566, 603 (WD Okla. 1979).[4]

The jury also was advised that punitive damages need not be proved by "direct evidence of fraud, malice or gross negligence." *Ibid.* Rather, these could be "inferred." *Ibid.* Although there was no evidence showing a direct causal connection between any Kerr-McGee neglect and Silkwood's minor contamination, two witnesses—testifying as experts—found fault in general with operations at the plant such as inadequate employee training and lack of supervision.[5] The AEC, in the discharge of its regulatory responsibility, had cited the plant some 75 times over a period of years for various minor violations.[6] None of the violations, however, was shown to have caused the contamination, or deemed substantial enough to justify imposition of fines by the AEC.[7] Moreover, the Commission had investigated the physical security system at the plant only two months before Silkwood's contamination and found no significant deficiencies. After her contamination occurred, the AEC conducted an investigation of that incident. Again, no significant violation of AEC regulations was found. See *ante*, at 244; AEC Directorate of Regulatory Operations, Investigation Report No. 74–09, p. 5 (Dec. 16, 1974).

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[3] The distinction in this case between the two types of damages is of major importance. There is no element of regulation when compensatory damages are awarded, especially when liability is imposed without fault as authorized by state law. Moreover, personal injuries are finite. To be sure, as the compensatory award in this case illustrates, these can result in large compensatory judgments. But juries do have guidance from physicians, medical records, lost wages, and—where permanent disability or death occurs—actuarial testimony as to lost earnings and life expectancy. None of these is present when punitive damages are awarded. The contrast also is illustrated by this case. A jury with neither pretrial knowledge of nuclear plant operations nor evidence to guide or limit its discretion, chose $10 million. It could, as well, have been almost any other amount.

[4] The trial court also instructed the jury that the size of any punitive damages award should be "consistent with the general purpose of such an award in deterring the defendant, and others like it, from committing similar acts in the future, and for punishment of the defendant for such acts." 585 F. Supp., at 603.

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[5] Silkwood also proffered reports of AEC investigations of incidents occurring in 1971, 1972, and 1973. The incidents of most concern were a fire on March 5, 1973, and radioactive seepage from a waste container discovered on September 25, 1973. Neither incident resulted in any contamination outside the Kerr-McGee plant or in any injury from contamination of Kerr-McGee employees. The AEC did not fine the company in either instance. Other testimony on behalf of Silkwood criticized generally the training of new personnel, the use of respirators in contaminated areas, the design of glove boxes in the plant, and a perceived lack of awareness of Kerr-McGee employees that exposure to plutonium may cause cancer.

[6] It is evident from these facts that the AEC was diligent and thorough in overseeing the safety of the Kerr-McGee plant.

[7] In fact, except for the contamination of Silkwood that caused her to lose seven days of work, there was no evidence that anyone else had ever been injured by contamination from the Kerr-McGee plant. There was evidence of one incident involving minor contamination outside the plant that occurred on April 17, 1972. In that instance, three maintenance personnel at the plant violated company regulations by leaving for breakfast without checking themselves for signs of contamination. Upon their return, it was discovered that they had received low level contamination prior to leaving for breakfast. None of these employees was shown to have suffered any injury. The amount of contamination involved in this incident was so minimal that an AEC official testified that there was no need for Kerr-McGee to report it to the AEC.

Nevertheless, the jury imposed $10 million of punitive damages, and on a motion for judgment n. o. v. the District Court agreed with the jury's award, based on its finding that the "escape of plutonium [was] caused by grossly negligent, reckless and willful conduct." 485 F. Supp., at 585. These serious conclusions simply were "inferred"—in the absence of specific evidence—from the fact that some plutonium contamination had occurred and from the testimony of petitioner's experts as to overall operating conditions at the plant.

The Court defends the awarding—even on the basis of inferences—of punitive damages judgments by lay juries with no competency to understand the highly sophisticated technology of nuclear facilities. In doing so, it states: "Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted. . . . [T]he company is unable to point to anything in the legislative history or in the regulations that indicates that punitive damages were not to be allowed." *Ante*, at 255. In my view, this conclusion is irreconcilable with *Pacific Gas & Electric Co.*'s pre-emption holding.

B

We stated in *Pacific Gas & Electric Co.* that "the Federal Government has occupied entirely the field of nuclear safety concerns." 461 U. S., at 212. On its face this is a holding that state action of any kind in this area is pre-empted, whether or not Congress has been silent on specific issues that may arise. See *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 153 (1982); *United States* v. *Shimer*, 367 U. S. 374, 381–383 (1961). We reiterated this principle of pre-emption in *Pacific Gas & Electric Co.* when we held that only those "powers *expressly* ceded to the States" are not pre-empted. 461 U. S., at 212 (emphasis added).

Petitioner concedes that Congress did not refer to punitive damages in the text or legislative history of the 1954 Act or its subsequent amendments. The absence of an express reference appears plainly to bring state law of punitive damages within the sweeping pre-emption we found that Congress intended in *Pacific Gas & Electric Co.* Nevertheless, the Court today makes an exception to the rule announced only last Term by refusing to find pre-emption unless the party arguing *for* pre-emption can find direct support in the statute, legislative history, or regulations. Where broad federal preemption has been found, the burden of proving an exception always should be on the party who wishes to rely on state law. The Court's decision today inexplicably shifts this burden to allow state law to prevail in the absence of a showing that Congress expressly had intended to pre-empt it.

The Court does purport to find some indirect evidence of congressional intent not to pre-empt state punitive damages law in the legislative history of the Price-Anderson Act, enacted in 1957. In considering the relevance of this Act, it is important to bear in mind that it did not apply at all to the Kerr-McGee plant at the time of this incident, and that its purpose was not regulatory in any relevant sense whatever. Price-Anderson was the result of concern, particularly prevalent when experience with nuclear energy had been limited, that extraordinary nuclear disasters could occur. In anticipating such an occurrence, the primary concern—of course—was to assure compensation for persons who suffered loss or injury. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 93 (1978). A secondary, but nonetheless important concern, was that private enterprise be encouraged to build and operate nuclear powerplants to meet the anticipated energy needs of our Nation. With the then uncertain prospect of a nuclear plant disaster that would bankrupt the utility, some sort of federally backed insurance plan was desirable in the overall public interest as well as that of the primary victims who suffered injury. *Id.*, at 63–65. Accordingly, in summary, Price-Anderson provided that the aggregate liability for a single nuclear accident may not exceed $560 million. Licensees were required to purchase the maximum amount of insurance available in the commercial insurance industry (approximately $60 million), and the Government agreed to indemnify licensees for the remainder. In addition, Price-Anderson required that licensees must waive all legal defenses and must agree to be subject to strict liability in the event of an extraordinary nuclear occurrence. *Id.*, at 65.

Thus, neither the Price-Anderson Act itself nor its purposes are relevant to this case. Petitioner and the Court, finding nothing whatever in the legislative history of the Atomic Energy Act, cite several statements in the legislative history of Price-Anderson that there was no intention to change state tort law.[8] There is no mention in this history of state punitive damages law. The argument, however, is that "tort law" includes both compensatory and punitive awards. This may be true generally but certainly not necessarily true in the context in which the term "tort law" was used in Price-Anderson. When considering legislation addressing the possibility of a catastrophic nuclear accident, it was natural for Congress to make clear that the availability of compensatory damages in ordinary personal injury and property damages cases was not at issue. Such damages were to be imposed without fault. Congress was not concerned in that Act with the "punishment" of nuclear plants through jury imposition of punitive damages.

However one may view the bits and pieces of the Price-Anderson Act's legislative history, for present purposes the regulatory plan would appear to be clear. The regulation of nuclear safety then, as now, had been entrusted by a different Act to an expert body with full authority to issue comprehensive regulations and assess penalties, and with the obligation to oversee the safety of nuclear operations.

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[8] See, *e. g.*, S. Rep. No. 1605, 89th Cong., 2d Sess., 25 (1966); S. Rep. No. 296, 85th Cong., 1st Sess., 9, 22 (1957).

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II

Even if *Pacific Gas & Electric Co.* had not been decided, I would find pre-emption of punitive damages awards because they conflict with the fundamental concept of comprehensive federal regulation of nuclear safety.[9] See *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941).

A

Congress has been committed to the policy of encouraging private development of nuclear energy from 1954 to the present.[10] We explicitly recognized this commitment in *Pacific Gas & Electric Co.*, 461 U. S., at 206–207. The economy particularly of the Western Democracies—perhaps, indeed, democracy itself—depends upon the energy that is now primarily derived from fossil sources. No informed person suggests that these sources are inexhaustible. We had a brief but shattering experience in 1973 during the embargo on Middle East oil. The effect of this experience confirmed the wisdom—indeed necessity—of identifying and exploiting alternative energy sources—particularly for the long term. The most promising new source identified to date is nuclear-generated energy.

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[9] Silkwood argues that the regulation of Kerr-McGee's conduct through punitive damages is an area of local, rather than federal, concern. Assuming, *arguendo*, that this assertion is correct, the degree of local concern is irrelevant. Federal pre-emption doctrine applies regardless of the importance of the issue to local authorities. *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 153 (1982). As the Court stated in *Free* v. *Bland*, 369 U. S. 663 (1962): "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Id.*, at 666.

[10] As a result of advances in nuclear technology, the percentage of total electricity produced in the United States by nuclear means rose from zero in 1954 to 12% in 1981. See Statistical Abstract of the United States, 1982–1983, p. 581; 2 Historical Statistics of the United States 826 (1975). During that period, and to this day, I do not recall that any fatalities have occurred as a result of contamination from nuclear facilities. Much of the credit for the progress and safety record of the nuclear industry also must go to Congress for enacting appropriate safety regulatory authority and to the action and oversight of the AEC and its successor, the NRC.

Public safety always has been an overriding concern both in Government regulation and the industry. Striking the balance between the need to promote nuclear development and the responsibility to insure public safety is a task that requires a unique level of professional expertise. Congress has enacted detailed legislation and created a highly qualified administrative agency to promulgate and enforce regulations.[11] Those regulations constitute a uniform body of law carefully designed to balance safety and efficiency in nuclear facilities across the country. *Northern States Power Co.* v. *Minnesota*, 447 F. 2d 1143, 1153–1154 (CA8 1971), summarily aff'd, 405 U. S. 1035 (1972).

The effectiveness of the overall program requires that nuclear policy and regulation be insulated from ad hoc, uninformed and perhaps biased decisionmaking.[12] It is reasonable for a nuclear facility to be held liable, even without fault on its part, to compensate for injury or loss occasioned by the operation of the facility. It is not reasonable to infer that Congress intended to allow juries of lay persons, selected essentially at random, to impose unfocused penalties solely for the purpose of punishment and some undefined deterrence. These purposes wisely have been left within the regulatory authority and discretion of the NRC.[13]

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[11] Congress gave the AEC several means of enforcing its regulations. The Act provides for injunctive remedies, civil penalties, and revocation of licenses for violation of the terms and conditions of the license. 42 U. S. C. §§ 2236, 2280, and 2282 (1976 ed. and Supp. V). The Act also provides criminal sanctions for willful violations of the Act and most AEC (NRC) regulations. 42 U. S. C. §§ 2272 and 2273 (1976 ed. and Supp. V).

[12] In recent years there has been a dramatic increase in public concern over all nuclear activities—a concern that may well influence juries. No doubt this has been caused by the public's new awareness of the potential for vast destruction through the use of nuclear weapons—an awareness evidenced by the now commonplace demonstrations and antinuclear groups and movements that can exist, of course, only in the free world. Often little or no distinction is made between nuclear powerplants designed to help insure the future of our civilization and the proliferation of nuclear weapons that could destroy it. Those who fail to see this distinction seem to be unaware of the overall safety record of the nuclear power industry in the United States and other countries. See Cohen, Most Scientists Don't Join in Radiation Phobia, Wall Street Journal, Nov. 30, 1983, p. 28, col. 4 ("even well-educated segments of the American public are badly misinformed" as to the risks associated with the nuclear power industry).

B

This case is a disquieting example of how the jury system can function as an unauthorized regulatory medium. Under accepted principles of tort law punitive damages may not properly be awarded on the basis of negligent conduct. A jury therefore must find malicious, wanton, or grossly negligent conduct. As noted above, the evidence presented by plaintiff at the trial for the most part was wide-ranging "expert" testimony as to the overall operation of the defendant plant. There was little evidence related in any causal way to the plutonium leak that contaminated Ms. Silkwood. Nor was there any evidence whatever of the "oppression," "fraud," "malice," or "wanton reckless[ness]" mentioned in the trial court's inflammatory instructions to the jury. See *supra*, at 278.

More importantly, the trial court did not instruct the jury, as would have been proper, that if it found that Kerr-McGee had complied with the regulations there could be no finding of fraud, malice, or wanton or reckless conduct. Rather, in effect, the jury was told that *it* could decide that the regulations were invalid:

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[13] The Atomic Energy Act currently provides that the NRC can levy civil penalties for violations of licensing provisions, rules, regulations, or orders. 42 U. S. C. § 2282(a) (1976 ed., Supp. V). The penalties may not exceed $100,000 for each violation, but where a violation is a continuing one, each day of the violation is considered a separate violation. *Ibid.* At the time of Ms. Silkwood's contamination, the maximum limit on civil penalties was $25,000. 42 U. S. C. § 2282(a), amended by Pub. L. 96-295, 94 Stat. 787. By establishing maximum fines, Congress implicitly stated its views on the size of monetary penalties it deemed sufficient to achieve both punishment and deterrence. See H. R. Rep. No 96-1070, pp. 33-34 (1980); S. Rep. No. 96-176, pp. 23-24 (1979).

> "[S]uch regulations do not have to be accepted by you as right or accurate if they defy *human credence*, are questionable under best scientific knowledge, or can be shown not to accomplish their intended purpose." 485 F. Supp., at 606 (emphasis added).

Until today, I had not understood that a jury lawfully could be instructed on the basis of its own determination of "human credence" to conclude that a presumptively valid federal regulation simply could be ignored. This Court nevertheless—without knowing which of the jumble of instructions the jury actually followed[14]—concluded that the award of punitive damages does not conflict with the regulation program established by Congress and the AEC. On the record, it is at least more likely than not that the jury totally ignored federal regulations as authorized by the trial court. Moreover, the Court attaches no importance to the fact that the AEC—the agency that adopted the regulations and was responsible for their enforcement—investigated the Silkwood incident and found no significant violation of its regulations. See *supra*, at 277.

C

As support for its conclusion that punitive damages and federal nuclear safety regulation do not conflict, the Court states that Congress did not intend to promote private development of nuclear power "by means that fail to provide adequate remedies for those who are injured by exposure to hazardous nuclear materials." *Ante*, at 257. The Court cites no authority—in the statute, its history, or the regulations—for its view that Congress intended that "adequate remedies" for persons injured should include "award[s] of punitive damages." Nor was this case tried on the theory that punitive damages could be awarded as a remedy for injuries suffered by Silkwood. The instructions to the jury were precisely to the contrary, and were explicit that the purpose of punitive damages was to "punish" the "offender for the general benefit of society." *Supra*, at 276. And petitioner has not argued in this Court that the $505,000 of "actual damages" awarded were inadequate for the injury suffered in this case. The $10 million of punitive damages were simply a windfall for petitioner.

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[14] The instructions invited the jury to condemn the entire operation of the Kerr-McGee plant. The instructions, purporting to state "the law" that the jury was "bound to follow," were some 10,000 words long, requiring 30 pages in the printed appendix. They were repetitive, arguably conflicting, and would have confused a panel of experienced lawyers. It is unlikely that any lay juror had any idea what law he or she was called upon to apply.

III

In sum, the Court's decision will leave this area of the law in disarray. No longer can the operators of nuclear facilities rely on the regulations and oversight of the NRC. Juries unfamiliar with nuclear technology may be competent to determine and assess compensatory damages on the basis of liability without fault. They are unlikely, however, to have even the most rudimentary comprehension of what reasonably must be done to assure the safety of employees and the public.[15] The District Court in this case, by instructing the jury that it could infer malice, fraud, or gross negligence (see *ibid.*), in effect authorized the jury to impose punitive damages *without fault*. And, to make sure that the jury understood its standardless freedom in this respect, the

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[15] The Court cites a House Report in which Congress expressed its misgivings about the ability of the States to deal with the complex and technical nature of the safety considerations in the nuclear industry. See H. R. Rep. No. 1125, 86th Cong., 1st Sess., 3 (1959). The Court, nevertheless, is willing to allow a jury, untrained in even the most rudimentary aspects of nuclear technology, to impose heavy penalties on the basis of its own perceptions or prejudices.

Court also instructed the jury that it could ignore the regulations prescribed by the AEC if in its opinion they defied "human credence" or "can be shown not to accomplish their intended purpose." *Supra*, at 284.

We hardly could have spoken more clearly in *Pacific Gas & Electric Co.* on April 20, 1983, on the issue of pre-emption.

> "State safety regulation is not pre-empted only when it conflicts with federal law. Rather, the Federal Government has occupied the entire field of nuclear safety concerns . . . ." 461 U. S., at 212.

This left no doubt whatever as to the sole responsibility for nuclear safety regulation under the governance of the NRC and its large staff—experts in the technology and safety controls of nuclear energy. This case makes clear the correctness of the Court's holding in *Pacific Gas & Electric. Co.* Today, the Court opens a wide and inviting door to indirect regulation by juries authorized to impose damages to punish and deter on the basis of inferences even when a plant has taken the utmost precautions provided by law. Not only is this unfair, it also could discourage investment needed to further the acknowledged national need for this alternative source of energy. I would affirm the judgment of the Court of Appeals.

Syllabus

MICHIGAN *v.* CLIFFORD ET AL.

CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

No. 82–357. Argued October 5, 1983—Decided January 11, 1984

Respondents' private residence was damaged by an early morning fire while they were out of town. Firefighters extinguished the blaze at 7:04 a. m., at which time all fire officials and police left the premises. Five hours later, a team of arson investigators arrived at the residence for the first time to investigate the cause of the blaze. They found a work crew on the scene boarding up the house and pumping water out of the basement. The investigators learned that respondents had been notified of the fire and had instructed their insurance agent to send the crew to secure the house. Nevertheless, the investigators entered the residence and conducted an extensive search without obtaining either consent or an administrative warrant. Their search began in the basement where they found two Coleman fuel cans and a crock pot attached to an electrical timer. The investigators determined that the fire had been caused by the crock pot and timer and had been set deliberately. After seizing and marking the evidence found in the basement, the investigators extended their search to the upper portions of the house where they found additional evidence of arson. Respondents were charged with arson and moved to suppress all the evidence seized in the warrantless search on the ground that it was obtained in violation of their rights under the Fourth and Fourteenth Amendments. The Michigan trial court denied the motion on the ground that exigent circumstances justified the search. On interlocutory appeal, the Michigan Court of Appeals found that no exigent circumstances existed and reversed.

Held: The judgment is affirmed in part and reversed in part.

JUSTICE POWELL, joined by JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL, concluded that where reasonable expectations of privacy remain in fire-damaged premises, administrative searches into the cause and origin of a fire are subject to the warrant requirement of the Fourth Amendment absent consent or exigent circumstances. There are especially strong expectations of privacy in a private residence and respondents here retained significant privacy interests in their fire-damaged home. Because the warrantless search of the basement and upper areas of respondents' home was authorized neither by consent nor by exigent circumstances, the evidence seized in that search was obtained in violation of respondents' rights under the Fourth and Fourteenth Amendments and must be suppressed. Pp. 291–299.

(a) Where a warrant is necessary to search fire-damaged premises, an administrative warrant suffices if the primary object of the search is to determine the cause and origin of the fire, but a criminal search warrant, obtained upon a showing of probable cause, is required if the primary object of the search is to gather evidence of criminal activity. Pp. 291–295.

(b) The search here was not a continuation of an earlier search, and the privacy interests in the residence made the delay between the fire and the midday search unreasonable absent a warrant, consent, or exigent circumstances. *Michigan* v. *Tyler*, 436 U. S. 499, distinguished. Because the cause of the fire was known upon search of the basement, the search of the upper portions of the house could only have been a search to gather evidence of arson requiring a criminal warrant absent exigent circumstances. Even if the basement search had been a valid administrative search, it would not have justified the upstairs search, since as soon as it had been determined that the fire originated in the basement, the scope of the search was limited to the basement area. Pp. 296–298.

JUSTICE STEVENS concluded that the search of respondents' home was unreasonable in contravention of the Fourth Amendment because the investigators made no effort to provide fair advance notice of the inspection to respondents. A nonexigent, forceful, warrantless entry cannot be reasonable unless the investigator has made some effort to give the owner sufficient notice to be present while the investigation is made. Pp. 303–305.

POWELL, J., announced the judgment of the Court and delivered an opinion, in which BRENNAN, WHITE, and MARSHALL, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 299. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN and O'CONNOR, JJ., joined, *post*, p. 305.

Janice M. Joyce Bartee argued the cause *pro hac vice* for petitioner. With her on the brief were *William L. Cahalan*, *Edward Reilly Wilson*, and *Timony A. Baughman*.

K. Preston Oade, Jr., argued the cause and filed a brief for respondents.

JUSTICE POWELL announced the judgment of the Court and delivered an opinion, in which JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL joined.

This case presents questions as to the authority of arson investigators, in the absence of exigent circumstances or consent, to enter a private residence without a warrant to investigate the cause of a recent fire.

I

Respondents, Raymond and Emma Jean Clifford, were arrested and charged with arson in connection with a fire at their private residence. At the preliminary examination held to establish probable cause for the alleged offense, the State introduced various pieces of physical evidence, most of which was obtained through a warrantless and nonconsensual search of the Cliffords' fire-damaged home. Respondents moved to suppress this evidence on the ground that it was obtained in violation of their rights under the Fourth and Fourteenth Amendments. That motion was denied and respondents were bound over for trial. Before trial, they again moved to suppress the evidence obtained during the search. The trial court conducted an evidentiary hearing and denied the motion on the ground that exigent circumstances justified the search. The court certified its evidentiary ruling for interlocutory appeal and the Michigan Court of Appeals reversed.

That court held that there were no exigent circumstances justifying the search. Instead, it found that the warrantless entry and search of the Clifford residence were conducted pursuant to a policy of the Arson Division of the Detroit Fire Department that sanctioned such searches as long as the owner was not present, the premises were open to trespass, and the search occurred within a reasonable time of the fire. The Court of Appeals held that this policy was inconsistent with *Michigan* v. *Tyler*, 436 U. S. 499 (1978), and that the warrantless nonconsensual search of the Cliffords' residence violated their rights under the Fourth and Fourteenth Amendments. We granted certiorari to clarify doubt that appears to exist as to the application of our decision in *Tyler*. 459 U. S. 1168 (1983).

II

In the early morning hours of October 18, 1980, a fire erupted at the Clifford home. The Cliffords were out of town on a camping trip at the time. The fire was reported to the Detroit Fire Department, and fire units arrived on the scene about 5:40 a. m. The fire was extinguished and all fire officials and police left the premises at 7:04 a. m.

At 8 o'clock on the morning of the fire, Lieutenant Beyer, a fire investigator with the arson section of the Detroit Fire Department, received instructions to investigate the Clifford fire. He was informed that the Fire Department suspected arson. Because he had other assignments, Lieutenant Beyer did not proceed immediately to the Clifford residence. He and his partner finally arrived at the scene of the fire about 1 p. m. on October 18.

When they arrived, they found a work crew on the scene. The crew was boarding up the house and pumping some six inches of water out of the basement. A neighbor told the investigators that he had called Mr. Clifford and had been instructed to request the Cliffords' insurance agent to send a boarding crew out to secure the house. The neighbor also advised that the Cliffords did not plan to return that day. While the investigators waited for the water to be pumped out, they found a Coleman fuel can in the driveway that was seized and marked as evidence.[1]

By 1:30 p. m., the water had been pumped out of the basement and Lieutenant Beyer and his partner, without obtaining consent or an administrative warrant, entered the Clifford residence and began their investigation into the cause of the fire. Their search began in the basement and they quickly confirmed that the fire had originated there beneath the basement stairway. They detected a strong odor of fuel throughout the basement, and found two more Coleman fuel cans beneath the stairway. As they dug through the debris, the investigators also found a crock pot with attached wires leading to an electrical timer that was plugged into an outlet a few feet away. The timer was set to turn on at approximately 3:45 a. m. and to turn back off at approximately 9 a. m. It had stopped somewhere between 4 and 4:30 a. m. All of this evidence was seized and marked.

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[1] The can had been found in the basement by the fire officials who had fought the blaze. The firemen removed the can and put it by the side door where Lieutenant Beyer discovered it on his arrival.

After determining that the fire had originated in the basement, Lieutenant Beyer and his partner searched the remainder of the house. The warrantless search that followed was extensive and thorough. The investigators called in a photographer to take pictures throughout the house. They searched through drawers and closets and found them full of old clothes. They inspected the rooms and noted that there were nails on the walls but no pictures. They found wiring and cassettes for a video tape machine but no machine.

Respondents moved to exclude all exhibits and testimony based on the basement and upstairs searches on the ground that they were searches to gather evidence of arson, that they were conducted without a warrant, consent, or exigent circumstances, and that they therefore were *per se* unreasonable under the Fourth and Fourteenth Amendments. Petitioner, on the other hand, argues that the entire search was reasonable and should be exempt from the warrant requirement.

III

In its petition for certiorari, the State does not challenge the state court's finding that there were no exigent circumstances justifying the search of the Clifford home. Instead, it asks us to exempt from the warrant requirement all administrative investigations into the cause and origin of a fire. We decline to do so.

In *Tyler*, we restated the Court's position that administrative searches generally require warrants. 436 U. S., at 504–508. See *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307 (1978); *Camara* v. *Municipal Court*, 387 U. S. 523 (1967); *See* v. *City of Seattle*, 387 U. S. 541 (1967). We reaffirm that view again today. Except in certain carefully defined classes of cases,[2] the nonconsensual entry and search of property are governed by the warrant requirement of the Fourth and Fourteenth Amendments. The constitutionality of warrantless and nonconsensual entries onto fire-damaged premises, therefore, normally turns on several factors: whether there are legitimate privacy interests in the fire-damaged property that are protected by the Fourth Amendment; whether exigent circumstances justify the government intrusion regardless of any reasonable expectations of privacy; and, whether the object of the search is to determine the cause of fire or to gather evidence of criminal activity.

A

We observed in *Tyler* that reasonable privacy expectations may remain in fire-damaged premises. "People may go on living in their homes or working in their offices after a fire. Even when that is impossible, private effects often remain on the fire-damaged premises." *Tyler*, 436 U. S., at 505. Privacy expectations will vary with the type of property, the amount of fire damage, the prior and continued use of the premises, and in some cases the owner's efforts to secure it against intruders. Some fires may be so devastating that no reasonable privacy interests remain in the ash and ruins, regardless of the owner's subjective expectations. The test essentially is an objective one: whether "the expectation [is] one that society is prepared to recognize as 'reasonable.'" *Katz* v. *United States*, 389 U. S. 347, 361 (1967) (Harlan, J., concurring). See also *Smith* v. *Maryland*, 442 U. S. 735, 739–741 (1979). If reasonable privacy interests remain in the fire-damaged property, the warrant requirement applies, and any official entry must be made pursuant to a warrant in the absence of consent or exigent circumstances.

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[2] See, *e. g.*, *Donovan* v. *Dewey*, 452 U. S. 594 (1981) (heavily regulated business); *United States* v. *Biswell*, 406 U. S. 311 (1972) (same); *Colonnade Corp.* v. *United States*, 397 U. S. 72 (1970) (same). The exceptions to the warrant requirement recognized in these cases are not applicable to the warrantless search in this case.

B

A burning building of course creates an exigency that justifies a warrantless entry by fire officials to fight the blaze. Moreover, in *Tyler* we held that once in the building, officials need no warrant to *remain*[3] for "a reasonable time to investigate the cause of a blaze after it has been extinguished." 436 U. S., at 510. Where, however, reasonable expectations of privacy remain in the fire-damaged property, additional investigations begun after the fire has been extinguished and fire and police officials have left the scene, generally must be made pursuant to a warrant or the identification of some new exigency.

The aftermath of a fire often presents exigencies that will not tolerate the delay necessary to obtain a warrant or to secure the owner's consent to inspect fire-damaged premises.[4] Because determining the cause and origin of a fire serves a compelling public interest, the warrant requirement does not apply in such cases.

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[3] We do not suggest that firemen fighting a fire normally remain within a building. The circumstances, of course, vary. In many situations actual entry may be too hazardous until the fire has been wholly extinguished, and even then the danger of collapsing walls may exist. Thus, the effort to ascertain the cause of a fire may extend over a period of time with entry and reentry. The critical inquiry is whether reasonable expectations of privacy exist in the fire-damaged premises at a particular time, and if so, whether exigencies justify the reentries.

[4] For example, an immediate threat that the blaze might rekindle presents an exigency that would justify a warrantless and nonconsensual postfire investigation. "Immediate investigation may also be necessary to preserve evidence from intentional or accidental destruction." See *Michigan* v. *Tyler*, 436 U. S. 499, 510 (1978).

C

If a warrant is necessary, the object of the search determines the type of warrant required. If the primary object is to determine the cause and origin of a recent fire, an administrative warrant will suffice.[5] To obtain such a warrant, fire officials need show only that a fire of undetermined origin has occurred on the premises, that the scope of the proposed search is reasonable and will not intrude unnecessarily on the fire victim's privacy, and that the search will be executed at a reasonable and convenient time.

If the primary object of the search is to gather evidence of criminal activity, a criminal search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be found in the place to be searched. If evidence of criminal activity is discovered during the course of a valid administrative search, it may be seized under the "plain view" doctrine. *Coolidge* v. *New Hampshire*, 403 U. S. 443, 465–466 (1971). This evidence then may be used to establish probable cause to obtain a criminal search warrant. Fire officials may not, however, rely on this evidence to expand the scope of their administrative search without first making a successful showing of probable cause to an independent judicial officer.

The object of the search is important even if exigent circumstances exist. Circumstances that justify a warrantless search for the cause of a fire may not justify a search to gather evidence of criminal activity once that cause has been determined. If, for example, the administrative search is justified by the immediate need to ensure against rekindling, the scope of the search may be no broader than reasonably necessary to achieve its end. A search to gather evidence of criminal activity not in plain view must be made pursuant to a criminal warrant upon a traditional showing of probable cause.[6]

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[5] Probable cause to issue an administrative warrant exists if reasonable legislative, administrative, or judicially prescribed standards for conducting an inspection are satisfied with respect to a particular dwelling. See particularly *Tyler*, *supra;* see also *Camara* v. *Municipal Court*, 387 U. S. 523, 538 (1967).

The searches of the Clifford home, at least arguably, can be viewed as two separate ones: the delayed search of the basement area, followed by the extensive search of the residential portion of the house. We now apply the principles outlined above to each of these searches.

IV

The Clifford home was a two-and-one-half story brick and frame residence. Although there was extensive damage to the lower interior structure, the exterior of the house and some of the upstairs rooms were largely undamaged by the fire, although there was some smoke damage. The firemen had broken out one of the doors and most of the windows in fighting the blaze. At the time Lieutenant Beyer and his partner arrived, the home was uninhabitable. But personal belongings remained, and the Cliffords had arranged to have the house secured against intrusion in their absence. Under these circumstances, and in light of the strong expectations of privacy associated with a home, we hold that the Cliffords retained reasonable privacy interests in their fire-damaged residence and that the postfire investigations were subject to the warrant requirement. Thus, the warrantless and nonconsensual searches of both the basement and the upstairs areas of the house would have been valid only if exigent circumstances had justified the object and the scope of each.

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[6] The plain-view doctrine must be applied in light of the special circumstances that frequently accompany fire damage. In searching solely to ascertain the cause, firemen customarily must remove rubble or search other areas where the cause of fires is likely to be found. An object that comes into view during such a search may be preserved without a warrant.

A

As noted, the State does not claim that exigent circumstances justified its postfire searches. It argues that we either should exempt postfire searches from the warrant requirement or modify *Tyler* to justify the warrantless searches in this case. We have rejected the State's first argument and turn now to its second.

In *Tyler* we upheld a warrantless postfire search of a furniture store, despite the absence of exigent circumstances, on the ground that it was a continuation of a valid search begun immediately after the fire. The investigation was begun as the last flames were being doused, but could not be completed because of smoke and darkness. The search was resumed promptly after the smoke cleared and daylight dawned. Because the postfire search was interrupted for reasons that were evident, we held that the early morning search was "no more than an actual continuation of the first, and the lack of a warrant thus did not invalidate the resulting seizure of evidence." 436 U. S., at 511.

As the State conceded at oral argument, this case is distinguishable for several reasons. First, the challenged search was not a continuation of an earlier search. Between the time the firefighters had extinguished the blaze and left the scene and the arson investigators first arrived about 1 p. m. to begin their investigation, the Cliffords had taken steps to secure the privacy interests that remained in their residence against further intrusion. These efforts separate the entry made to extinguish the blaze from that made later by different officers to investigate its origin. Second, the privacy interests in the residence—particularly after the Cliffords had acted—were significantly greater than those in the fire-damaged furniture store, making the delay between the fire and the midday search unreasonable absent a warrant, consent, or exigent circumstances. We frequently have noted that privacy interests are especially strong in a private residence.[7] These facts—the interim efforts to secure the burned-out premises and the heightened privacy interests in the home—distinguish this case from *Tyler*. At least where a homeowner has made a reasonable effort to secure his fire-damaged home after the blaze has been extinguished and the fire and police units have left the scene, we hold that a subsequent postfire search must be conducted pursuant to a warrant, consent, or the identification of some new exigency.[8] So long as the primary purpose is to ascertain the cause of the fire, an administrative warrant will suffice.

B

Because the cause of the fire was then known, the search of the upper portions of the house, described above, could only have been a search to gather evidence of the crime of arson. Absent exigent circumstances, such a search requires a criminal warrant.

Even if the midday basement search had been a valid administrative search, it would not have justified the upstairs search. The scope of such a search is limited to that reasonably necessary to determine the cause and origin of a fire and to ensure against rekindling. As soon as the investigators determined that the fire had originated in the basement and had been caused by the crock pot and timer found beneath the basement stairs, the scope of their search was limited to the basement area. Although the investigators could have used whatever evidence they discovered in the basement to establish probable cause to search the remainder of the house, they could not lawfully undertake that search without a prior judicial determination that a successful showing of probable cause had been made. Because there were no exigent circumstances justifying the upstairs search, and it was undertaken without a prior showing of probable cause before an independent judicial officer, we hold that this search of a home was unreasonable under the Fourth and Fourteenth Amendments, regardless of the validity of the basement search.[9]

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[7] See, *e. g.*, *Payton* v. *New York*, 445 U. S. 573, 589–590 (1980); *United States* v. *United States District Court*, 407 U. S. 297, 313 (1972). Reasonable expectations of privacy in fire-damaged premises will vary depending particularly on the type and use of the building involved. Expectations of privacy are particularly strong in private residences and offices. There may be, depending upon the circumstances, diminished privacy expectations in commercial premises.

[8] This is not to suggest that individual expectations of privacy may prevail over interests of public safety. For example, when fire breaks out in an apartment unit of an apartment complex, the exigency exception may allow warrantless postfire investigations where necessary to ensure against any immediate danger of future fire hazard.

The warrantless intrusion into the upstairs regions of the Clifford house presents a telling illustration of the importance of prior judicial review of proposed administrative searches. If an administrative warrant had been obtained in this case, it presumably would have limited the scope of the proposed investigation and would have prevented the warrantless intrusion into the upper rooms of the Clifford home. An administrative search into the cause of a recent fire does not give fire officials license to roam freely through the fire victim's private residence.

V

The only pieces of physical evidence that have been challenged on this interlocutory appeal are the three empty fuel cans, the electric crock pot, and the timer and attached cord. Respondents also have challenged the testimony of the investigators concerning the warrantless search of both the basement and the upstairs portions of the Clifford home. The discovery of two of the fuel cans, the crock pot, the timer and cord—as well as the investigators' related testimony—were the product of the unconstitutional postfire search of the Cliffords' residence. Thus, we affirm that portion of the judgment of the Michigan Court of Appeals that excluded that evidence. One of the fuel cans was discovered in plain view in the Cliffords' driveway. This can was seen in plain view during the initial investigation by the firefighters. It would have been admissible whether it had been seized in the basement by the firefighters or in the driveway by the arson investigators. Exclusion of this evidence should be reversed.

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[9] In many cases, there will be no bright line separating the firefighters' investigation into the cause of a fire from a search for evidence of arson. The distinction will vary with the circumstances of the particular fire and generally will involve more than the lapse of time or the number of entries and reentries. For example, once the cause of a fire in a single-family dwelling is determined, the administrative search should end, and any broader investigation should be made pursuant to a criminal warrant. A fire in an apartment, on the other hand, may present complexities that make it necessary for officials to conduct more expansive searches, to remain on the premises for longer periods of time, and to make repeated entries and reentries into the building. See *Tyler*, 436 U. S., at 510, n. 6.

It is so ordered.

JUSTICE STEVENS, concurring in the judgment.

Because I continue to hold the views expressed in my separate opinions in *Michigan* v. *Tyler*, 436 U. S. 499, 512 (1978), *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 325 (1978), *Zurcher* v. *Stanford Daily*, 436 U. S. 547, 577–578, 583 (1978), and *Donovan* v. *Dewey*, 452 U. S. 594, 606–608 (1981), I am unable to join JUSTICE POWELL's opinion. I do agree with him, however, that the holding in *Tyler* supports the judgment commanded by his opinion.

There is unanimity within the Court on three general propositions regarding the scope of Fourth Amendment protection afforded to the owner of a fire-damaged building. No one questions the right of the firefighters to make a forceful, unannounced, nonconsensual, warrantless entry into a burning building. The reasonableness of such an entry is too plain to require explanation. Nor is there any disagreement concerning the firemen's right to remain on the premises, not only until the fire has been extinguished and they are satisfied that there is no danger of rekindling, but also while they continue to investigate the cause of the fire. We are also unanimous in our opinion that after investigators have determined the cause of the fire and located the place it originated, a search of other portions of the premises may be conducted only pursuant to a warrant, issued upon probable cause that a crime has been committed, and specifically describing the places to be searched and the items to be seized. The issues that divide us in this case are (1) whether the entry by Lieutenant Beyer and his partner at 1:30 p. m. should be regarded as a continuation of the original entry or a separate postfire search, and (2) whether a warrantless entry to make a postfire investigation into the cause of a fire without the owner's consent is constitutional.

I

I agree with JUSTICE POWELL's conclusion that Lieutenant Beyer's entry at 1:30 p. m. was a postfire search rather than merely a continuation of an earlier valid entry, *ante*, at 296, and disagree with JUSTICE REHNQUIST's position that our decision in *Tyler* is indistinguishable in this regard, *post*, at 306–307. In *Tyler* the Court was willing to treat early morning reentries by the same officers who had been on the premises a few hours earlier[1] as a "continuation" of their earlier valid investigation into the cause of the fire. 436 U. S., at 511. The attempt to ascertain the cause of the fire was temporarily suspended in *Tyler* because visibility was severely hindered by darkness, steam, and smoke. Under these circumstances, the return of the same[2] investigators shortly after daybreak to ascertain the cause of the fire was indeed "no more than an actual continuation" of their earlier valid search. *Ibid.* Unlike *Tyler*, in this case the challenged entry was made by officers who had not been on the premises at the time of an earlier valid search. Moreover, in contrast to *Tyler*, an investigation of the fire's origin was not temporarily suspended on account of the conditions at the scene and resumed at the first opportunity when the conditions hampering the investigation subsided. While the investigators in this case waited for the work crew on the scene to pump water out of the basement before making their entry, the delay in their arrival at the scene apparently had nothing to do with the fact that water had collected in the basement. While that fact might have justified a temporary suspension of an investigative effort commenced by investigators at the scene before the premises were abandoned by fire officials, in this case it amounts to a *post hoc* justification without apparent basis in reality. In general, unless at least some of the same personnel are involved in a return to the premises and the temporary departure was justifiably and actually occasioned by the conditions at the premises, I would apply the test expressed by JUSTICE WHITE for measuring the scope of the emergency that justified the initial entry and search: "[O]nce the fire has been extinguished and the firemen have left the premises, the emergency is over." *Id.*, at 516. I would only add that the departure of the firemen should also establish a presumption that the fire has been extinguished and that any danger of rekindling is thereafter too slight to provide an independent justification for a second entry, a presumption that could only be rebutted by additional information demonstrating a previously unknown or unrecognized danger of rekindling.

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[1] Fire Chief See entered with Assistant Chief Somerville at 8 a. m. and Detective Webb accompanied Somerville at 9 a. m. See had been on the scene at 2 a. m. and Webb had arrived at 3:30 a. m. See 436 U. S., at 501–502.

[2] It is true that in *Tyler* Assistant Chief Somerville first arrived on the scene at 8 a. m., but presumably he did not observe anything that was not also seen by Chief See or Detective Webb, both of whom had been on the scene earlier.

II

Presumably most postfire searches are made with the consent of the property owner. Once consent is established, such searches, of course, raise no Fourth Amendment issues. We therefore are concerned with the fire investigator's right to make an entry without the owner's consent, by force if necessary. The problem, then, is to identify the constraints imposed by the Fourth Amendment on an officer's authority to make such an entry.

In this context, the Amendment might be construed in at least four different ways. First, the Court might hold that no warrantless search of premises in the aftermath of a fire is reasonable and that no warrant may issue unless supported by probable cause that a crime has been committed. Such a holding could be supported by reference to the text of the two Clauses of the Fourth Amendment.[3] No Member of the Court, however, places such a strict construction on the Amendment.

Second, the Court might hold that no warrantless search is reasonable but allow postfire searches conducted pursuant to a warrant issued without a showing of probable cause. Following *Marshall* v. *Barlow's, Inc., supra,* JUSTICE POWELL takes this position. In my judgment that position is at odds with the text of the Fourth Amendment and defeats the purpose of the Warrant Clause, enabling a magistrate's rubber stamp to make an otherwise unreasonable search reasonable.

Third, the Court might hold that no warrant is ever required for a postfire search. If the search is conducted promptly and if its scope is limited to a determination of the cause of the fire, it is reasonable with or without probable cause to suspect arson. JUSTICE REHNQUIST has persuasively outlined the basis for that position,[4] and has noted that in certain cases there may be some justification for requiring the inspectors to notify the building's owners of the inspection. *Post*, at 311, n. 4.

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[3] As I noted in *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307 (1978):

"The first Clause states that the right to be free from unreasonable searches 'shall not be violated';[1] the second unequivocally prohibits the issuance of warrants except 'upon probable cause.'[2]" *Id.*, at 326.

"[1] 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .'" *Id.*, at 326, n. 1.

"[2] '[A]nd no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'" *Id.*, at 326, n. 2.

[4] To the extent, however, that he relies on the danger of rekindling, I believe his analysis is flawed. I would suppose that JUSTICE POWELL

A fourth position—the one I believe the two Clauses of the Fourth Amendment command—would require the fire investigator to obtain a traditional criminal search warrant in order to make an unannounced entry, but would characterize a warrantless entry as reasonable whenever the inspector either had given the owner sufficient advance notice to enable him or an agent to be present, or had made a reasonable effort to do so.[5]

Unless fire investigators have probable cause to believe the crime of arson has been committed, I believe that the homeowner is entitled to reasonable advance notice that officers are going to enter his premises for the purpose of ascertaining the cause of the fire. Such notice would give the owner a fair opportunity to be present while the investigation is conducted, virtually eliminating the need for a potentially confrontational forcible entry. Advance notice of the search is the best safeguard of the owner's legitimate interests in the privacy of his premises, allowing him to place certain possessions he would legitimately prefer strangers not to see out of sight, and permitting him to be present during the search

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would also dispense with a warrant requirement if that danger were present. Surely I would. For analytical purposes, I believe we must assume that the postfire investigation cannot be supported on an emergency rationale but rather is justified by the general regulatory interest in preventing similar fires, including those set by arsonists.

[5] By prohibiting the issuance of any warrant to make an unannounced, nonconsensual entry into the home, unless there is probable cause to believe a crime has been committed, my reading of the Fourth Amendment carries out the express purpose of the Warrant Clause. JUSTICE POWELL's view that a so-called administrative warrant will suffice does not, I submit, provide the protection contemplated by that Clause. On the other hand, because I am persuaded that a postfire investigatory search is reasonable—even without either suspicion or probable cause—when advance notice is given to the homeowner, the purpose of the Reasonableness Clause can be satisfied without obtaining an administrative warrant that is nothing more than a rubber stamp.

to assure that it does not exceed reasonable bounds. Moreover, the risk of unexplained harm or loss to the owner's personal effects would be minimized, and the owner would have an opportunity to respond to questions about the premises or to volunteer relevant information that might assist the investigators. It is true, of course, that advance notice would increase somewhat the likelihood that a guilty owner would conceal or destroy relevant evidence, but it seems fair to assume that the criminal will diligently attempt to cover his traces in all events. In any event, if probable cause to believe that the owner committed arson is lacking, and if the justifications for a general policy of unannounced spot inspections that obtain in some regulatory contexts are also lacking, a mere suspicion that an individual has engaged in criminal activity is insufficient to justify the intrusion on an individual's privacy that an unannounced, potentially forceful entry entails.

Since there was no attempt to give any kind of notice to respondents, this case does not provide a proper occasion for defining the character of the notice that must be given. I am convinced, however, that a nonexigent, forceful, warrantless entry cannot be reasonable unless the investigator has made some effort to give the owner sufficient notice to be present while the investigation is made. Naturally, if the owner is given reasonable notice and then attempts to interfere with the legitimate performance of the fire investigators' duties, appropriate sanctions would be permissible.

If there is probable cause to believe that a crime has been committed, the issuance of a valid warrant by a neutral magistrate will enable the entry and subsequent search to be conducted in the same manner as any other investigation of suspected criminal conduct, without advance notice to the property owner. In such a case, the intrusive nature of the potentially forceful entry without prior notice is justified by the demonstrated reasonable likelihood that the owner of the property will conceal or destroy the object of the search if prior notice is provided. *Zurcher* v. *Stanford Daily*, 436 U. S., at 582 (STEVENS, J., dissenting).

In this case, as JUSTICE REHNQUIST has pointed out, *post*, at 310, n. 3, an argument may be made that the notice requirement is inapplicable because the owners were out of town. But no attempt whatever was made to provide them with notice, or even to prove that it would have been futile to do so. The record does not foreclose the possibility that an effort to advise them, possibly through the same party that notified the representatives of the insurance company to board up the building, might well have resulted in a request that a friend or neighbor be present in the house while the search was carried out and thus might have avoided the plainly improper search of the entire premises after the cause of the fire had already been identified.

I therefore conclude that the search in this case was unreasonable in contravention of the Fourth Amendment because the investigators made no effort to provide fair notice of the inspection to the owners of the premises. Accordingly, I concur in the Court's judgment.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, JUSTICE BLACKMUN, and JUSTICE O'CONNOR join, dissenting.

Six Terms ago in *Michigan* v. *Tyler*, 436 U. S. 499 (1978), we first addressed the applicability of the Fourth Amendment's Warrant Clause to the activities of firefighters and inspectors following a fire at a furniture store. A divided Court held that the fire itself was an "exigent circumstance" which allowed entry to extinguish the fire and authorized investigators to remain for a reasonable time to investigate the cause of the blaze. *Id.*, at 509–510. We also held that a "re-entry" a few hours after these officials had departed was an "actual continuation" of the earlier investigation, but that subsequent visits more than three weeks after the fire required an administrative warrant. *Id.*, at 511. These precepts of *Tyler* have not proved easy to apply, and we are told in the plurality opinion in this case that "[w]e granted certiorari to clarify doubt that appears to exist as to the application of our decision in *Tyler.*" *Ante*, at 289. But that same opinion demonstrates beyond peradventure that if that was our purpose, we have totally failed to accomplish it; today's opinion, far from clarifying the doubtful aspects of *Tyler*, sows confusion broadside. I would hold that the "exigent circumstances" doctrine enunciated in *Tyler* authorized the search of the basement of the Clifford home, although the remaining parts of the house could not have been searched without the issuance of a warrant issued upon probable cause.

I

Judging simply by comparison of these facts to those in *Tyler*, I believe that the basement inspection conducted by Lieutenant Beyer about 1:30 p. m. on October 18th—some six hours after the fire was extinguished and the fire officials and police had left the Clifford premises—was an "actual continuation" of the original entry to fight the fire, as that term is used in *Tyler*. The firefighters who fought the blaze at the Clifford house had removed a can containing Coleman lantern fuel and placed it in the driveway of the home, where it was later seized and marked as evidence by the inspectors who arrived about 1 p. m. Thus here, as in *Tyler*, the investigation into the cause of the fire went on contemporaneously with the efforts to fight it, before the firefighters first left the premises in the early morning. I see no reason to treat the 6-hour delay between the departure of the firefighters and the arrival of the investigators in this case any differently than the Court treated the 5-hour delay between the departure of the investigators at 4 a. m. from the Tyler store and their return to the same premises at 9 a. m.

The plurality seeks to distinguish the two situations on the basis of differences which seem to me both trivial and immaterial. It says that in that interim in our case, the Cliffords "had taken steps to secure their privacy interests that remained in their residence against further intrusion." *Ante,* at 296. While this may go to the question of whether or not there was an invasion of a privacy interest amounting to a search, it has no bearing on the question of whether there were exigent circumstances which constitute an exception to the warrant requirement for what is concededly a search. The plurality also intimates that the "firefighters" did nothing but fight the fire, and that the arson investigation did not begin until the arson investigators arrived at 1 o'clock in the afternoon. *Ibid.* But firefighting and fire investigation are obviously not this neatly compartmentalized, as is shown by the fact that the firefighters themselves were alert to signs of the cause of the fire and had removed the Coleman lantern fuel can for inspection by the later team of arson investigators.

The plurality also purports to distinguish the facts in *Tyler* by the statement that "the privacy interests in the residence—particularly after the Cliffords had acted—were significantly greater than those in the fire-damaged furniture store . . . ." *Ante,* at 296. But if the furniture store in *Tyler* is to be characterized as "fire-damaged," surely the Cliffords' residence deserves the same characterization; it too was "fire-damaged." It is also well established that private commercial buildings in this context are as much protected by the Fourth Amendment as are private dwellings. See *See* v. *City of Seattle,* 387 U. S. 541, 542–543 (1967) (citing cases). And certainly the public interest in determining the cause and origin of a fire in a commercial establishment applies with equal, if not greater, force to the necessity of determining the cause and origin of a fire in a home.

On the authority of *Tyler,* therefore, I would uphold the search of the Clifford basement and allow use of the evidence resulting from that search in the arson trial.

II

In *Camara* v. *Municipal Court*, 387 U. S. 523 (1967), and *See* v. *City of Seattle*, *supra*, this Court imposed a warrant requirement on city housing and fire inspectors requiring them to obtain an administrative search warrant prior to entering a building to inspect for possible health or fire code violations. To protect the privacy interests of building owners from the unbridled discretion of municipal inspectors, the Court held that administrative searches had to be conducted pursuant to a warrant obtained from an independent magistrate. *Camara*, *supra*, at 534. But in light of the important public interest in abating public health hazards, the relatively limited invasion of privacy inhering in administrative searches, and the essentially noncriminal focus of the inspection, a different kind of warrant was established, a warrant described by the dissent in that case as "newfangled." *See*, *supra*, at 547 (Clark, J., dissenting). Probable cause to issue this kind of warrant did not sound in terms of suspicion of criminal activity, but in terms of reasonable legislative or administrative standards governing the decision to search a particular building. *Camara*, *supra*, at 538.

One may concede the correctness of the *Camara-See* line of cases without agreeing that those cases should be applied to a prompt postfire inspection conducted to determine the cause and origin of a fire. The practice of investigating the cause and origin of fires has longstanding and widespread acceptance. The public interest in conducting a prompt and careful investigation of the cause and origin of all fires is also undeniably strong. An investigation can reveal whether there is a danger of the fire rekindling and assess the effectiveness of local building codes in preventing and limiting the spread of fire. It may bring to light facts suggesting the crime of arson. Entry is also necessary because the causes of a fire may also not be observable from outside a building or by an uninformed occupant. See *United States* v. *Green*, 474 F. 2d

1385, 1388–89 (CA5 1973). Certainly these reasons justify a search to determine the cause and origin of a fire.

The concerns regarding administrative searches expressed in *Camara* and *See* to justify the imposition of a warrant requirement simply do not apply to a postfire investigation conducted within a reasonable time after a fire.[1] Under the emergency doctrine, it is beyond dispute that firefighters may enter a building in order to extinguish the flames. *Michigan* v. *Tyler*, 436 U. S., at 509. In their efforts to control the blaze firefighters may knock in doors and windows, chop holes in roofs and walls, and generally take full control of a structure to extinguish a fire. In the aftermath of a fire an individual is unlikely to have much concern over the limited intrusion of a fire inspector coming into his premises to learn why there had been a fire. Fire victims, unlike occupants at ordinary times, generally expect and welcome the intrusions of fire, police, and medical officials in the period following a fire. Likewise, as here, relative strangers such as insurance agents will frequently have authority to enter the structure. In these circumstances, the intrusion of the fire inspector is hardly a new or substantially different intrusion from that which occurred when the firefighters first arrived to extinguish the flames. Instead, it is analogous to intrusions of medical officials and insurance investigators who may arrive at the scene of the fire shortly after its origin.

Ample justification exists for a State or municipality to authorize a fire inspection program that would permit fire inspectors to enter premises to determine the cause and origin of the fire. But in no real sense can the investigation of the Cliffords' home be considered the result of the unbridled discretion of the city fire investigators who came to the Cliffords' home.[2] No justification existed to inspect the Cliffords' home until there was a fire. The fire investigators were not authorized to enter the Cliffords' home until the happening of some fortuitous or exigent event over which they had no control. Thus, if the warrant requirement exists to prevent individuals from being subjected to an unfettered power of government officials to initiate a search, a warrant is simply not required in these circumstances to limit the authority of a fire investigator, so long as his authority to inspect is contingent upon the happening of an event over which he has no control.[3]

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[1] What constitutes a reasonable time would have been determined on a case-by-case basis. Fire investigators may have more than one fire to investigate on any given day. In addition, fire investigators are entitled to wait until the embers and gasses of the fire have cooled, or as here, until the water pumped into the structure by the firefighters is pumped out.

In my view, the utility of requiring a magistrate to evaluate the grounds for a search following a fire is so limited that the incidental protection of an individual's privacy interests simply does not justify imposing a warrant requirement. Here the inspection was conducted within a short time of extinguishing of the flames, while the owners were away from the premises, and before the premises had been fully secured from trespass. In these circumstances the search of the basement to determine the cause and origin of the fire was reasonable.[4]

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[2] This is made abundantly clear by the Detroit Fire Department's policy regulating postfire investigations. That policy encourages investigators to conduct an investigation as promptly as possible. If the property is occupied or is a place of business trying to conduct business, inspectors are instructed to obtain consent or an administrative warrant. If the premises are occupied by children, inspectors must obtain consent from an adult before entry. To inspect premises secured from trespass, investigators must obtain consent or an administrative warrant. Only if the owners are away and the building open to trespass may fire investigators enter without consent or a warrant. App. 9a, 12a, 19a (testimony of Lt. Beyer and Capt. Monroe).

[3] The *Tyler* majority stated that a *major* function of the warrant requirement was to provide a property owner with sufficient information to reassure him of the legality of the entry. *Michigan* v. *Tyler*, 436 U. S. 499, 508 (1978). The relationship of this informational function and the privacy interest protected by the Fourth Amendment is not clear. Proper identification or some attempt at notifying the owners could allay any reasonable fears that the inspectors are impostors or lack authority to inspect for the origin and cause of the fire.

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[4] As noted in n. 3, *supra*, there may be some justification for requiring the inspectors to contact or attempt to contact the building's owners as to the inspection. But where, as here, the owners were out of town, it does not appear unreasonable to have conducted the inspection without prior notice to the owners. Notice simply informs the building owners that the building will be entered by persons possessing authority to enter the building. Yet the failure to notify the Cliffords prior to entry fails to advance in any significant way the purposes of the exclusionary rule. In point of fact, the fire investigators were told the Cliffords were unavailable, that they had gone fishing. App. 16a. Thus, in these circumstances the failure to notify the Cliffords seems reasonable. The Cliffords can also be deemed to have received constructive notice, because their agents were on the scene, and a neighbor apparently ascertained the legitimacy of the inspectors' visit.

SECRETARY OF THE INTERIOR ET AL. *v.* CALIFORNIA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82-1326. Argued November 1, 1983—Decided January 11, 1984*

Section 307(c)(1) of the Coastal Zone Management Act (CZMA) provides that "[e]ach Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs." CZMA defines the "coastal zone" to include state but not federal land near the shorelines of the several coastal States, as well as coastal waters extending "seaward to the outer limit of the United States territorial sea." The territorial sea for the States bordering on the Pacific Ocean or Atlantic Ocean extends three geographical miles seaward from the coastline. Submerged lands subject to the jurisdiction of the United States that lie beyond the territorial sea constitute the Outer Continental Shelf (OCS). By virtue of the Submerged Lands Act, the coastal zone belongs to the States, while the OCS belongs to the Federal Government. In these cases, the Department of the Interior (Interior), rejecting California's demands that a consistency review was required under § 307(c)(1), sold oil and gas leases of certain tracts on the OCS off the coast of California. California and other interested parties then filed suits in Federal District Court to enjoin the sale of some of the tracts, alleging that Interior had violated § 307(c)(1) in that leasing sets in motion a chain of events that culminates in oil and gas development and therefore "directly affects" the coastal zone within the meaning of § 307(c)(1). The District Court entered a summary judgment for the plaintiffs, holding that a consistency determination was required before the sale. The Court of Appeals affirmed.

Held: Interior's sale of OCS oil and gas leases is not an activity "directly affecting" the coastal zone within the meaning of § 307(c)(1), and thus a consistency review is not required under that section before such sales are made. Pp. 320–343.

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*Together with No. 82-1327, *Western Oil & Gas Association et al.* v. *California et al.*, and No. 82-1511, *California et al.* v. *Secretary of the Interior et al.*, also on certiorari to the same court.

(a) CZMA nowhere defines or explains which federal activity should be viewed as "directly affecting" the coastal zone, but the legislative history of § 307(c)(1) discloses that Congress did not intend the section to reach OCS lease sales. The "directly affecting" language was aimed primarily at activities conducted or supported by federal agencies on federal lands physically situated in the coastal zone but excluded from the zone as formally defined by CZMA. This reading of § 307(c)(1) finds further support in the history of other sections of CZMA. Pp. 321–330.

(b) Nor is a broader reading of § 307(c)(1) compelled by the thrust of other CZMA provisions. It is clear that Congress believed that CZMA's purposes could be adequately effectuated without reaching federal activities conducted outside the coastal zone. Moreover, an examination of § 307's structure suggests that lease sales are a type of federal agency activity not intended to be covered by § 307(c)(1). Section 307(c)(3), which deals with private parties' activities authorized by a federal agency's issuance of licenses and permits, is the provision that is more pertinent to OCS lease sales, and that provision definitely does *not* require consistency review of such sales. Pp. 331–335.

(c) Congress has carefully codified the fine distinction between a sale of a "lease" and the issuance of a permit to "explore for," "produce," or "develop" oil or gas. By the time the leases in question here were sold, it was clear that a lease sale by Interior did *not* involve the submission or approval of "any plan for the exploration or development of, or production from" the lease tracts. Since 1978, when the Outer Continental Shelf Lands Act of 1953 (OCSLA) was amended, there have been four statutory stages to developing an offshore oil well: (1) preparation of a leasing program, (2) lease sales (the stage in dispute here), (3) exploration by the lessees, and (4) development and production. The purchase of an OCS lease, standing alone, entails no right to explore for, develop, or produce oil or gas resources on the OCS. The first two stages are not subject to consistency review, but the last two stages are. Under OCSLA's plain language, the purchase of a lease entails no right to proceed with full exploration, development, or production that might trigger § 307(c)(3)(B)'s consistency review provisions; the lessee acquires only a priority in submitting plans to conduct those activities. Pp. 335–341.

(d) Even if OCS lease sales are viewed as involving an activity "conduct[ed]" or "support[ed]" by a federal agency within the meaning of § 307(c)(1), lease sales cannot be characterized as "directly affecting" the coastal zone. Since 1978, the sale of a lease grants the lessee the right to conduct only very limited "preliminary activities" on the OCS, and does not authorize full-scale exploration, development, or production. Those activities may not begin until separate federal approval has been obtained. In these circumstances, the possible effects on the coastal zone that may eventually result from the sale of a lease cannot be termed "direct." Pp. 342–343.

683 F. 2d 1253, reversed.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 344.

Solicitor General Lee argued the cause for petitioners in No. 82–1326 and respondents in No. 82–1511. With him on the briefs were *Assistant Attorney General Dinkins, Deputy Solicitors General Wallace* and *Claiborne, Acting Assistant Attorney General Habicht, Richard G. Wilkins, Peter R. Steenland, Jr.*, and *Anne S. Almy*. *E. Edward Bruce* argued the cause for Western Oil & Gas Association et al., petitioners in No. 82–1327 and respondents in No. 82–1511. With him on the briefs was *Howard J. Privett*.

Theodora Berger, Assistant Attorney General, argued the cause for the State of California et al. in all cases. With her on the brief for the State of California et al., respondents in Nos. 82–1326 and 82–1327, were *John K. Van de Kamp*, Attorney General, *N. Gregory Taylor*, Assistant Attorney General, and *John A. Saurenman*, Deputy Attorney General. *Roger Beers, Kathryn Burkett Dickson*, and *William M. Boyd* filed a brief for the County of Humboldt et al., respondents in Nos. 82–1326 and 82–1327. Mr. Van de Kamp, Mr. Taylor, Ms. Berger, Mr. Saurenman, *Trent W. Orr*, Mr. Beers, Ms. Dickson, and Mr. Boyd filed briefs for petitioners in No. 82–1511. Mr. Orr filed a brief for the Natural Resources Defense Council, Inc., et al., respondents in Nos. 82–1326 and 82–1327.†

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†Briefs of *amici curiae* urging affirmance were filed for the State of Alaska by *Norman C. Gorsuch*, Attorney General, and *G. Thomas Koester*, Assistant Attorney General; for the State of Florida by *Jim Smith*, Attorney General, and *Gerald B. Curington* and *Bruce Barkett*,

JUSTICE O'CONNOR delivered the opinion of the Court.

These cases arise out of the Department of the Interior's sale of oil and gas leases on the Outer Continental Shelf (OCS) off the coast of California. We must determine whether the sale is an activity "directly affecting" the coastal zone under § 307(c)(1) of the Coastal Zone Management Act (CZMA). That section provides in its entirety:

> "Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs." 86 Stat. 1285, 16 U. S. C. § 1456(c)(1) (1982 ed.).

We conclude that the Secretary of the Interior's sale of Outer Continental Shelf oil and gas leases is not an activity "directly affecting" the coastal zone within the meaning of the statute.

I

CZMA defines the "coastal zone" to include state but not federal land near the shorelines of the several coastal States, as well as coastal waters extending "seaward to the outer limit of the United States territorial sea." 16 U. S. C. § 1453(1) (1982 ed.). The territorial sea for States bordering on the Pacific Ocean or Atlantic Ocean extends three geographical miles seaward from the coastline. See 43 U. S. C. § 1301; *United States* v. *California*, 381 U. S. 139 (1965). Submerged lands subject to the jurisdiction of the United

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Assistant Attorneys General; for the State of New Jersey by *Irwin I. Kimmelman*, Attorney General, and *Deborah T. Poritz* and *John M. Van Dalen*, Deputy Attorneys General; and for the Coastal States Organization et al. by *H. Bartow Farr III* and the Attorneys General for their respective States as follows: *Joseph Lieberman* of Connecticut, *Charles M. Oberly III* of Delaware, *Tany S. Hong* of Hawaii, *James E. Tierney* of Maine, *Stephen H. Sachs* of Maryland, *Francis X. Bellotti* of Massachusetts, *Robert Abrams* of New York, *Rufus L. Edmisten* of North Carolina, *Dave Frohmayer* of Oregon, and *Kenneth O. Eikenberry* of Washington.

States that lie beyond the territorial sea constitute the "outer Continental Shelf." See 43 U. S. C. § 1331(a). By virtue of the Submerged Lands Act, passed in 1953, the coastal zone belongs to the States, while the OCS belongs to the Federal Government. 43 U. S. C. §§ 1302, 1311.

CZMA was enacted in 1972 to encourage the prudent management and conservation of natural resources in the coastal zone. Congress found that the "increasing and competing demands upon the lands and waters of our coastal zone" had "resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion." 16 U. S. C. § 1451(c) (1982 ed.). Accordingly, Congress declared a national policy to protect the coastal zone, to encourage the States to develop coastal zone management programs, to promote cooperation between federal and state agencies engaged in programs affecting the coastal zone, and to encourage broad participation in the development of coastal zone management programs. 16 U. S. C. § 1452 (1982 ed.).

Through a system of grants and other incentives, CZMA encourages each coastal State to develop a coastal management plan. Further grants and other benefits are made available to a coastal State after its management plan receives federal approval from the Secretary of Commerce. To obtain such approval a state plan must adequately consider the "national interest" and "the views of Federal agencies principally affected by such program." 16 U. S. C. §§ 1455(c)(8), 1456(b) (1982 ed.).

Once a state plan has been approved, CZMA § 307(c)(1) requires federal agencies "conducting or supporting activities directly affecting the coastal zone" to do so "consistent" with the state plan "to the maximum extent practicable." 16 U. S. C. § 1456(c)(1) (1982 ed.). The Commerce Department has promulgated regulations implementing that provision. Those regulations require federal agencies to prepare a "consistency determination" document in support of any activity that will "directly affect" the coastal zone of a State with an approved management plan. The document must identify the "direct effects" of the activity and inform state agencies how the activity has been tailored to achieve consistency with the state program. 15 CFR §§ 930.34, 930.39 (1983).

II

OCS lease sales are conducted by the Department of the Interior (Interior). Oil and gas companies submit bids, and the high bidders receive priority in the eventual exploration for and development of oil and gas resources situated in the submerged lands on the OCS. A lessee does not, however, acquire an immediate or absolute right to explore for, develop, or produce oil or gas on the OCS; those activities require separate, subsequent federal authorization.

In 1977, the Department of Commerce approved the California Coastal Management Plan. The same year, Interior began preparing Lease Sale No. 53—a sale of OCS leases off the California coast near Santa Barbara. Interior first asked several state and federal agencies to report on potential oil and gas resources in this area. The agency then requested bidders, federal and state agencies, environmental organizations, and the public to identify which of 2,036 tracts in the area should be offered for lease. In October 1978, Interior announced the tentative selection of 243 tracts, including 115 tracts situated in the Santa Maria Basin located off western Santa Barbara. Various meetings were then held with state agencies. Consultations with other federal agencies were also initiated. Interior issued a Draft Environmental Impact Statement in April 1980.

On July 8, 1980, the California Coastal Commission informed Interior that it had determined Lease Sale No. 53 to be an activity "directly affecting" the California coastal zone. The State Commission therefore demanded a consistency determination—a showing by Interior that the lease sale would be "consistent" to the "maximum extent practicable" with the state coastal zone management program. Interior responded that the lease sale would not "directly affect" the California coastal zone. Nevertheless, Interior decided to remove 128 tracts, located in four northern basins, from the proposed lease sale, leaving only the 115 tracts in the Santa Maria Basin. In September 1980, Interior issued a final Environmental Impact Statement. On October 27, 1980, it published a proposed notice of sale, limiting bidding to the remaining 115 blocks in the Santa Maria Basin. 45 Fed. Reg. 71140 (1980).

On December 16, 1980, the State Commission reiterated its view that the sale of the remaining tracts in the Santa Maria Basin "directly affected" the California coastal zone. The Commission expressed its concern that oil spills on the OCS could threaten the southern sea otter, whose range was within 12 miles of the 31 challenged tracts. The Commission explained that it "has been consistent in objecting to proposed offshore oil development within specific buffer zones around special sensitive marine mammal and seabird breeding areas . . . ." App. 77. The Commission concluded that 31 more tracts should be removed from the sale because "leasing within 12 miles of the Sea Otter Range in the Santa Maria Basin would not be consistent" with the California Coastal Management Program. *Id.*, at 79.[1] California Governor Brown later took a similar position, urging that 34 more tracts be removed. *Id.*, at 81.[2]

Interior rejected the State's demands. In the Secretary's view, no consistency review was required because the lease sale did not engage CZMA § 307(c)(1), and the Governor's request was not binding because it failed to strike a reasonable balance between the national and local interests. On April 10, 1981, Interior announced that the lease sale of the 115 tracts would go forward, and on April 27 issued a final notice of sale. 46 Fed. Reg. 23674 (1981).

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[1] Four of the objectionable tracts were combined as two for sale purposes, so the Commission's conclusion was actually directed to 29 sale tracts. *California* v. *Watt*, 520 F. Supp. 1359, 1367 (CD Cal. 1981).

[2] Again, the objection encompassed only 32 sale tracts. *Ibid.*

California and other interested parties (hereafter respondents) filed two substantially similar suits in Federal District Court to enjoin the sale of 29 tracts situated within 12 miles of the Sea Otter Range.[3] Both complaints alleged, *inter alia*, Interior's violation of § 307(c)(1) of CZMA.[4] They argued that leasing sets in motion a chain of events that culminates in oil and gas development, and that leasing therefore "directly affects" the coastal zone within the meaning of § 307(c)(1).

The District Court entered a summary judgment for respondents on the CZMA claim. *California* v. *Watt*, 520 F.

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[3] The litigation was instituted through separate but similar complaints filed by the State of California and by the Natural Resources Defense Council, Inc., the Sierra Club, Friends of the Earth, Friends of the Sea Otter, and the Environmental Coalition on Lease Sale No. 53. Plaintiffs sought declaratory and injunctive relief against the Secretary of the Interior and two other officials within the Department of the Interior. The Department itself, and the Bureau of Land Management, were also named as defendants. Western Oil and Gas Association, a regional trade association, and 12 of its members, intervened as defendants. Subsequently, various local governmental entities within California intervened as plaintiffs in the case commenced by the State.

Petitioner-defendants (hereafter petitioners) state their disagreement with the Court of Appeals for the Ninth Circuit's holding that environmental groups and local governments have standing to sue under CZMA § 307(c)(1), but do not challenge that standing decision here. Since the State of California clearly does have standing, we need not address the standing of the other respondents, whose position here is identical to the State's.

[4] Respondents claimed below that petitioners had also violated four other federal statutes. The District Court ruled for the defendants on those four claims, and the Court of Appeals for the Ninth Circuit affirmed the judgment on the non-CZMA claims that were appealed. Those claims are not presented here.

Supp. 1359 (CD Cal. 1981). The Court of Appeals for the Ninth Circuit affirmed that portion of the District Court judgment that required a consistency determination before the sale.[5] *California* v. *Watt*, 683 F. 2d 1253 (1982). We granted certiorari, 461 U. S. 925 (1983), and we now reverse.

III

Whether the sale of leases on the OCS is an activity "directly affecting" the coastal zone is not self-evident.[6] As

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[5] The Court of Appeals went on to rule that the Federal Government, not the State, makes the final determination as to whether a federal activity is consistent "to the maximum extent practicable" with the state management program. In view of our conclusion that a lease sale is not subject to § 307(c)(1)'s consistency review requirements, we need not decide who holds final authority to determine when sufficient consistency has been achieved.

[6] The National Oceanic and Atmospheric Administration (NOAA) in the Department of Commerce is the federal agency charged with administering CZMA. See 16 U. S. C. § 1463 (1982 ed). Under normal circumstances NOAA's understanding of the meaning of CZMA § 307(c)(1) would be entitled to deference by the courts. But in construing § 307(c)(1) the agency has walked a path of such tortured vacillation and indecision that no help is to be gained in that quarter.

In 1977, NOAA expressly declined to take a position on the applicability of § 307(c)(1) to the leasing process. See 42 Fed. Reg. 43591–43592 (1977). In 1978, NOAA issued regulations purporting to clarify § 307(c)(1), but the agency expressly acknowledged that the applicability of the section to lease sales was "still under consideration." 43 Fed. Reg. 10512 (1978). Interior nevertheless objected to the new verbal formulation of "directly affecting" that NOAA had proposed, and the interdepartmental dispute was submitted to the Department of Justice's Office of Legal Counsel (OLC). OLC rejected crucial portions of NOAA's regulations as inconsistent with the statutory language, and those portions were withdrawn by NOAA. App. 45–46; 44 Fed. Reg. 37142 (1979). In 1980 NOAA noted its view that OCS sales trigger consistency review requirements in a letter from NOAA to State Coastal Management Program Directors (Apr. 9, 1980). NOAA later renewed its attempt to arrive at a general definition of "directly affecting." Two weeks after the instant litigation commenced, NOAA took the position that lease sales do not directly affect the coastal zone. 46 Fed. Reg. 26660 (1981). But shortly after the already noted, OCS leases involve submerged lands outside the coastal zone, and as we shall discuss, an OCS lease authorizes the holder to engage only in preliminary exploration; further administrative approval is required before full exploration or development may begin. Both sides concede that the preliminary exploration itself has no significant effect on the coastal zone. Both also agree that a lease sale is one (not the first, see *infra*, at 337) in a series of decisions that may culminate in activities directly affecting that zone.

A

We are urged to focus first on the plain language of § 307(c)(1). Interior contends that "directly affecting" means "[h]av[ing] a [d]irect, [i]dentifiable [i]mpact on [t]he [c]oastal [z]one." Brief for Federal Petitioners 20. Respondents insist that the phrase means "[i]nitiat[ing] a [s]eries of [e]vents of [c]oastal [m]anagement [c]onsequence." Brief for Respondent State of California et al. 10.[7] But CZMA nowhere defines or explains which federal activities should be viewed as "directly affecting" the coastal zone, and the alternative verbal formulations proposed by the parties, both of which are superficially plausible, find no support in the Act itself.

We turn therefore to the legislative history.[8] A fairly detailed review is necessary, but that review persuades us that

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regulation was published in final form, *id.*, at 35253, the House Committee on Merchant Marine and Fisheries exercised a "legislative veto," see 16 U. S. C. § 1463a (1982 ed.), and the agency withdrew its regulation. 47 Fed. Reg. 4231 (1982).

[7] This formulation finds support in 1980 House and Senate Reports. H. R. Rep. No. 96-1012, p. 34; S. Rep. No. 96-783, p. 11. For reasons explained in n. 15, *infra*, we do not believe these Committee views, articulated many years after CZMA's passage, are reliable guides to the intent of the full Congress acting in 1972.

[8] As discussed *infra*, at 331-341, other sections of CZMA, as well as related provisions in the Outer Continental Shelf Lands Act of 1953, have been significantly amended since 1972. But § 307(c)(1) has not been changed since its enactment. Our decision must therefore turn principally on the language of § 307(c)(1) and the legislative history of the original, 1972 CZMA.

Congress did not intend OCS lease sales to fall within the ambit of CZMA § 307(c)(1).

In the CZMA bills first passed by the House and Senate, § 307(c)(1)'s consistency requirements extended only to federal activities "in" the coastal zone. The "directly affecting" standard appeared nowhere in § 307(c)(1)'s immediate antecedents. It was the House-Senate Conference Committee that replaced "in the coastal zone" with "directly affecting the coastal zone." Both Chambers then passed the Conference bill without discussing or even mentioning the change.

At first sight, the Conference's adoption of "directly affecting" appears to be a surprising, unexplained, and subsequently unnoticed expansion in the scope of § 307(c)(1), going beyond what was required by either of the versions of § 307(c)(1) sent to the Conference. But a much more plausible explanation for the change is available.

The explanation lies in the two different definitions of the "coastal zone." The bill the Senate sent to the Conference defined the coastal zone to exclude "lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents."[9]

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[9] S. 3507, 92d Cong., 2d Sess., § 304(a) (1972), reprinted at 118 Cong. Rec. 14188 (1972). The Senate's definition is now codified (with subsequent minor amendments) in 16 U. S. C. § 1453(1) (1982 ed.).

There was language in an earlier Senate Report (not the final CZMA Senate Report) urging that federal activities determined to have a "functional interrelationship" with the coastal zone "should" be administered consistently with approved state management programs. S. Rep. No. 92–526, pp. 20, 30 (1971). Nine years later a House Report reiterated the "functional interrelationship" standard. H. R. Rep. No. 96–1012, p. 34 (1980). But the Senate Report's language was purely precatory. It used "should," rather than the "shall" that actually appears in § 307(c)(1), and more importantly, was written in connection with a Senate bill that would have *entirely exempted* activities on all federal lands from § 307(c)(1)'s mandate. It is fanciful to suggest that an early Senate *Report* should be read as endorsing an expansive interpretation of § 307(c)(1)'s "directly affecting" language when the Senate *bill* that the Report accompanied did not include the relevant phrase and indisputably did *not* reach OCS lease sales.

This exclusion would reach federal parks, military installations, Indian reservations, and other federal lands that would lie within the coastal zone but for the fact of federal ownership. Under the Senate bill, activities on these lands would thus have been entirely exempt from compliance with state management plans. By contrast, the House bill's definition of "coastal zone" included lands under federal jurisdiction; thus federal activities on those lands were to be fully subject to § 307(c)(1)'s consistency requirement. Under *both* bills, however, submerged lands on the OCS were entirely excluded from the coastal zone, and federal agency activities in those areas thus were exempt from § 307(c)(1)'s consistency requirement.

Against this background, the Conference Committee's change in § 307(c)(1) has all the markings of a simple compromise. The Conference accepted the Senate's narrower definition of the "coastal zone," but then expanded § 307(c)(1) to cover activities on federal lands not "in" but nevertheless "directly affecting" the zone. By all appearances, the intent was to reach at least some activities conducted in those federal enclaves excluded from the Senate's definition of the "coastal zone."

Though cryptic, the Conference Report's reference to the change in § 307(c)(1) fully supports this explanation. "The Conferees . . . adopted the Senate language . . . which made it clear that Federal lands are not included within a state's coastal zone. *As to the use of such lands which would affect a state's coastal zone, the provisions of section 307(c) would apply.*" H. R. Conf. Rep. No. 92–1544, p. 12 (1972) (emphasis added). In the entire Conference Report, this is the only mention of the definition of the coastal zone chosen by the Conference, and the only hint of an explanation for the change in § 307(c)(1). The "directly affecting" language was not deemed worthy of note by any Member of Congress in the subsequent floor debates.[10] The implication seems clear:

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[10] On the other hand, in comments on the floor made before the House acted on the post-Conference bill, Congressman Mosher stated: "The final

"directly affecting" was used to strike a balance between two definitions of the "coastal zone." The legislative history thus strongly suggests that OCS leasing, covered by *neither* the House nor the Senate version of § 307(c)(1), was also intended to be outside the coverage of the Conference's compromise.

Nonetheless, the literal language of § 307(c)(1), read without reference to its history, is sufficiently imprecise to leave open the possibility that some types of federal activities conducted on the OCS could fall within § 307(c)(1)'s ambit. We need not, however, decide whether any OCS activities other than oil and gas leasing might be covered by § 307(c)(1), because further investigation reveals that in any event Congress expressly intended to remove the control of OCS resources from CZMA's scope.

B

If § 307(c)(1) and its history standing alone are less than crystalline, the history of other sections of the original CZMA bills impels a narrow reading of that clause. Every time it faced the issue in the CZMA debates, Congress deliberately and systematically insisted that no part of CZMA was to reach beyond the 3-mile territorial limit.

There are, first, repeated statements in the House and Senate floor debates that CZMA is concerned only with activities on land or in the territorial sea, not on the OCS, and that the allocation of state and federal jurisdiction over the coastal zone and the OCS was not to be changed in any way.[11] But

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version in no way affects the jurisdictional responsibilities of . . . the Department of the Interior in regard to the administration of Federal lands, since the conferees have specifically eliminated those land areas from the definition of coastal zone." 118 Cong. Rec. 35548 (1972).

[11] See, *e. g., id.*, at 14180 ("This bill covers the territorial seas; it does not cover the Outer Continental Shelf") (remark of Sen. Stevens); *id.*, at 14184 (facilities in the "contiguous zone" "would be outside the jurisdiction of the neighboring States") (remark of Sen. Boggs); *ibid.* ("this bill attempts to deal with the Territorial Sea, not the Outer Continental Shelf") (remark of Sen. Moss); *id.*, at 14185 ("we wanted to make certain that Federal

Congress took more substantial and significant action as well. Congress debated and firmly rejected at least four proposals to extend parts of CZMA to reach OCS activities.

Section 313 of the House CZMA bill, as reported by Committee and passed by the House, embodied the most specific of these proposals. That section would have achieved explicitly what respondents now contend § 307(c)(1) achieves implicitly. It provided:

> "(a) The Secretary shall develop . . . a program for the management of the area outside the coastal zone and within twelve miles of the [coast] . . . .
>
> "(b) To the extent that any part of the management program . . . shall apply to any high seas area, the subjacent seabed and subsoil of which lies within the seaward boundary of a coastal state, . . . the program shall be coordinated with the coastal state involved. . . .
>
> "(c) The Secretary shall, to the maximum extent practicable, apply the program . . . to waters which are adjacent to specific areas in the coastal zone which have been designated by the states for the purpose of preserving or restoring such areas for their conservation, recreational,

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jurisdiction was unimpaired beyond the 3-mile limit in the territorial sea") (remark of Sen. Hollings); *ibid.* ("this bill focuses on the territorial sea or the area that is within State jurisdiction, and preserves the Federal jurisdiction beyond, which is not to be considered or disturbed by the bill at this time") (remark of Sen. Moss); *id.*, at 26479 ("the measure does not diminish Federal or State jurisdiction, responsibility, or rights under other programs and does not supersede, modify, or repeal existing Federal law") (remark of Cong. Mosher); *id.*, at 26484 ("the Federal Government has jurisdiction outside the State area, from 3 miles to 12 miles at sea") (remark of Cong. Anderson); *id.*, at 35548 ("The final version [of CZMA] in no way affects the jurisdictional responsibilities of . . . the Department of Interior in regard to the administration of Federal lands, since the conferees have specifically eliminated those land areas from the definition of coastal zone") (remark of Cong. Mosher); *id.*, at 35550 ("the Federal Government has jurisdiction outside the State area, from 3 to 12 miles at sea") (remark of Cong. Anderson).

> ecological, or esthetic values." H. R. 14146, 92d Cong., 2d Sess., § 313 (1972), reprinted in H. R. Rep. No. 92–1049, p. 7 (1972).

Congressman Anderson of California, the drafter of this section and coauthor of the House CZMA bill, explained the section's purpose on the floor of the House. In light of the instant litigation, his comments were remarkably prescient. By 1972, Congressman Anderson pointed out, California had established seven marine sanctuaries, including one located near Santa Barbara, Cal., in the area allegedly threatened by the leases here in dispute.

> "These State-established sanctuaries, which extend from the coastline seaward to 3 miles, account for nearly a fourth of the entire California coast.
>
> "However, the Federal Government has jurisdiction outside the State area, from 3 miles to 12 miles at sea. All too often, the Federal Government has allowed development and drilling to the detriment of the State program.
>
> "A case in point is Santa Barbara where California established a marine sanctuary banning the drilling of oil in the area under State authority.
>
> "Yet, outside the sanctuary—in the federally controlled area—the Federal Government authorized drilling which resulted in the January 1969 blowout. This dramatically illustrated the point that oil spills do not respect legal jurisdictional lines." 118 Cong. Rec. 26484 (1972).[12]

House § 313, Congressman Anderson went on to explain, would play the crucial role of encouraging federal OCS oil and gas leasing to be conducted in a manner consistent with state management programs. *Ibid.;* see also *id.*, at 26495, 35549–35550.

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[12] Congressman Anderson repeated these remarks when he opposed an amendment that would have weakened House § 312, *id.*, at 26495, and again when he expressed his concern over the removal of House § 312 by the Senate-House Conference, *id.*, at 35550.

Since House § 313 would have provided respondents with precisely the protection they now seek here, it is significant that the Conference Committee, and ultimately the Congress as a whole, flatly rejected the provision. And the reason for the rejection, as explained in the Conference Report, was to forestall conflicts of the type before us now. "The Conferees . . . excluded [House § 313] authorizing a Federal management program for the contiguous zone of the United States, because the provisions relating thereto did not prescribe sufficient standards or criteria *and would create potential conflicts with legislation already in existence concerning Continental Shelf resources.*" H. R. Conf. Rep. No. 92–1544, p. 15 (1972) (emphasis added).

The House bill included another similar provision that would have been almost equally favorable to respondents here—had it not been rejected by the Conference and subsequently by Congress as a whole. Sections 312(b), (c), of the House bill invited the Secretary of Commerce to extend coastal zone marine sanctuaries established by the States into the OCS region.[13] But the Conference Committee rejected House § 312 as well. The Conference Report explained: "The Conferees agreed to delete the provisions of the House version relating to extension of estuarine sanctuaries, in view of the fact that the need for such provisions appears to be rather remote and could cause problems since they would extend beyond the territorial limits of the United States." H. R. Conf. Rep. No. 92–1544, pp. 14–15 (1972).

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[13] The section provided:

"(b) When an estuarine sanctuary is established by a coastal state . . . the Secretary, at the request of the state concerned, . . . may extend the established estuarine sanctuary seaward beyond the coastal zone, to the extent necessary to effectuate the purposes for which the estuarine sanctuary was established.

"(c) The Secretary shall . . . assure that the development and operation [of the sanctuary extension] is coordinated with the development and operation of the estuarine sanctuary of which it forms an extension." H. R. 14146, 92d Cong., 2d Sess., §§ 312(b), (c) (1972), reprinted in H. R. Rep. No. 92–1049, p. 7 (1972).

When the Conference bill returned to the House, with House §§312 and 313 deleted, Congressman Anderson expressed his dismay:

> "I am deeply disappointed that the Senate conferees would not accept the position of the House of Representatives regarding the extension of State-established marine sanctuaries to areas under Federal jurisdiction.
>
> ". . . [W]e were successful, in committee, in adding a provision which I authored designed to protect State-established sanctuaries, such as exis[t] off Santa Barbara, Calif., from federally authorized development.
>
> "This provision would have required the Secretary to apply the coastal zone program to waters immediately adjacent to the coastal waters of a State, which that State has designated for specific preservation purposes.
>
> "It was accepted overwhelmingly by the House of Representatives despite the efforts of the oil and petroleum industry to defeat it.
>
> "But what they failed to accomplish in the House, they accomplished in the conference committee . . . ." 118 Cong. Rec. 35549–35550 (1972).

In light of these comments by Congressman Anderson, and the express statement in the Conference Report that House §313 was removed to avoid "conflicts with legislation already in existence concerning Continental Shelf resources," see *supra*, at 327, it is fanciful to suggest that the Conferees intended the "directly affecting" language of §307(c)(1) to substitute for the House §313's specific and considerably more detailed language. Certainly the author of House §313 recognized that the amended §307(c)(1) could not serve that purpose.

Two similar attempts to extend CZMA's reach beyond the coastal zone were made in the Senate. These, as well, were firmly rejected on the Senate floor or in Conference.[14]

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[14] An amendment to CZMA proposed by Senator Boggs on the Senate floor would have given respondents all that they are asking for here. The amendment stated:

"Notwithstanding any other provision of this Act, no Federal department or agency shall construct, or license, or lease, or approve in any way the construction of any facility of any kind beyond the territorial sea off the coast of the United States until (1) such department or agency has filed with the Administrator of the Environmental Protection Agency, a complete report with respect to the proposed facility; (2) the Administrator has forwarded such report to the Governor of each adjacent coastal State which might be adversely affected by pollution from such facility; and (3) each such Governor has filed an approval of such proposal with the Administrator. . . ." 118 Cong. Rec. 14183 (1972).

In proposing the amendment Senator Boggs explained his concern with offshore oil transfer terminals located at sites outside the 3-mile territorial limit.

"Such sites, of course, would place these facilities in the contiguous zone, or in international waters on the Continental Shelf. If that were so, of course, the facility would be outside the jurisdiction of the neighboring States.

"Yet, the coastal zones of these neighboring States could be severely and adversely affected by pollution that might come from such an offshore facility.

". . . I believe it is important that the affected States play a meaningful role in the plan to construct such a facility." *Id.*, at 14184.

But other Senators immediately attacked Senator Boggs' amendment. Senator Hollings stated:

"The amendment . . . goes beyond the territorial sea and goes into what we agreed on and compromised on awhile ago. It goes beyond any territorial sea to construction of any facility on the ocean floor, into what we call a contiguous zone from the 3-mile limit to the 12-mile limit.

"This amendment provides the Governor would have a veto over such matters. I do not think the Senate wants to go that far." *Ibid.*

Senator Moss agreed: "[T]his bill attempts to deal with the Territorial Sea, not the Outer Continental Shelf." *Ibid.* In response, Senator Boggs conceded that the problem should be addressed in other legislation, and he withdrew the proposed amendment. *Ibid.*

In addition, § 316(c)(1) of the Senate bill as amended on the floor of the Senate called on the National Academy of Sciences "to undertake a full

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To recapitulate, the "directly affecting" language in § 307(c)(1) was, by all appearances, only a modest compromise, designed to offset in part the narrower definition of the coastal zone favored by the Senate and adopted by the Conference Committee. Section 307(c)(1)'s "directly affecting" language was aimed at activities conducted or supported by federal agencies on federal lands physically situated in the coastal zone but excluded from the zone as formally defined by the Act. Consistent with this view, the same Conference Committee that wrote the "directly affecting" language rejected two provisions in the House bill that would have required precisely what respondents seek here—coordination of federally sponsored OCS activities with state coastal management and conservation programs. In light of the Conference Committee's further, systematic rejection of every other attempt to extend the reach of CZMA to the OCS, we are impelled to conclude that the 1972 Congress did not intend § 307(c)(1) to reach OCS lease sales.[15]

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investigation of the environmental hazards attendant on offshore drilling on the Atlantic Outer Continental Shelf." S. 3507, 92d Cong., 2d Sess., § 316(c)(1) (1972), reprinted in 118 Cong. Rec. 14191 (1972). In the Senate debate several Senators voiced their opposition even to this modest venture outside the coastal zone. Senator Stevens, for example, argued that the provision was inappropriate because the OCS "is not even covered by this bill. This bill covers the territorial seas; it does not cover the Outer Continental Shelf." *Id.*, at 14180. Senator Moss added: "[S]ince the State coastal zone management programs relate only to the territorial sea, we should, therefore, be very careful of a study which extends beyond the territorial sea to encompass the Continental Shelf." *Id.*, at 14181. Again, the Conference Committee agreed; it deleted Senate § 316(c) without comment in the Conference Report. On the floor of the House Congressman Downing explained that the provision had been deleted "as nongermane." *Id.*, at 35547.

[15] Respondents rely heavily on four statements that appear in Committee Reports issued years after CZMA was enacted.

(1) A 1975 Senate Report stated: "The Committee's intent when the 1972 Act was passed was for the consistency clause to apply to Federal

IV

A

A broader reading of § 307(c)(1) is not compelled by the thrust of other CZMA provisions. First, it is clear beyond

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leases for offshore oil and gas development, since such leases were viewed by the Committee to be within the phrase 'licenses or permits' [in § 307(c)(3)]. [The Report then discusses the proposed amendment that would insert 'lease' into § 307(c)(3).] In practical terms, this [amendment] means that the Secretary of the Interior would need to seek the certification of consistency from adjacent State governors before entering into a binding lease agreement with private oil companies." S. Rep. No. 94–277, pp. 19–20 (1975).

(2) One footnote in a 323-page House Report that accompanied the 1978 amendments to the Outer Continental Shelf Lands Act of 1953 stated:

"The committee is aware that under the [CZMA] certain OCS activities including lease sales and approval of development and production plans must comply with 'consistency' requirements as to coastal zone management plans approved by the Secretary of Commerce. Except for specific changes made by Titles IV and V of the 1977 Amendments, nothing in this Act is intended to amend, modify or repeal any provision of [CZMA]. Specifically, nothing is intended to alter procedures under that Act for consistency once a State has an approved Coastal Zone Management Plan." H. R. Rep. No. 95–590, p. 153, n. 52 (1977).

(3) A 1980 House Report stated that the 1976 CZMA § 307 amendments "did not alter Federal agency responsibility to provide States with a consistency determination related to OCS decisions which preceded issuance of leases." H. R. Rep. No. 96–1012, p. 28.

(4) A 1980 Senate Report stated that under CZMA, "[t]he Department of the Interior's activities which preced[e] lease sales . . . remain subject to the requirements of section 307(c)(1). As a result, intergovernmental coordination for purposes of OCS development commences at the earliest practicable time in the opinion of the Committee, as the Department of the Interior sets in motion a series of events which have consequences in the coastal zone." S. Rep. No. 96–783, p. 11.

In our view, these subsequent Committee interpretations of CZMA, written three or more years after CZMA was passed, are of little help in ascertaining the intent of Congress when CZMA § 307(c)(1) was passed in 1972. We note that the most relevant and unambiguous statement of the House Committee's views appeared in House §§ 312 and 313 as originally reported out of Committee and passed by the House. But those sections peradventure that Congress believed that CZMA's purposes could be adequately effectuated without reaching federal activities conducted outside the coastal zone. Both the Senate and House bills were originally drafted, debated, and passed, with § 307(c)(1) expressly limited to federal activities *in* the coastal zone. Broad arguments about CZMA's structure, the Act's incentives for the development of state management programs, and the Act's general aspirations for state-federal cooperation thus cannot support the expansive reading of § 307(c)(1) urged by respondents.

Moreover, a careful examination of the structure of CZMA § 307 suggests that lease sales are a type of federal agency activity not intended to be covered by § 307(c)(1) at all.

Section 307(c) contains three coordinated parts. Paragraph (1) refers to activities "conduct[ed] or support[ed]" by a federal agency. Paragraph (2) covers "development project[s]" "undertake[n]" by a federal agency. Paragraph (3) deals with activities by private parties authorized by a federal agency's issuance of licenses and permits. The first two paragraphs thus reach activities in which the federal agency is itself the principal actor, the third reaches the federally approved activities of third parties. Plainly, Interior's OCS lease sales fall in the third category. Section 307(c)(1) should therefore be irrelevant to OCS lease sales, if only because drilling for oil or gas on the OCS is neither "conduct[ed]" nor "support[ed]" by a federal agency. Section

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were emphatically rejected by the full Congress when CZMA was enacted in 1972, see *supra*, at 324–329, and Committee-proposed amendments that would have had a similar effect were rejected when the Act was amended in 1976, see *infra*, at 334–335, and n. 18. Likewise, by 1976 the Senate Committee had taken a position favoring the extension of consistency review requirements to lease sales, see *ibid.*, but that position too was subsequently rejected by the full Congress, see n. 18, *infra*. Legislative Committees' desires to reaffirm positions they have taken that were rejected by the full Congress are understandable enough, but of little help in construing the intent behind the law actually enacted.

307(c)(3), not § 307(c)(1), is the more pertinent provision. Respondents' suggestion that the consistency review requirement of § 307(c)(3) is focused only on the private applicants for permits or licenses, not federal agencies, is squarely contradicted by abundant legislative history and the language of § 307(c)(3) itself.[16]

CZMA § 307(c)(3) definitely does *not* require consistency review of OCS lease sales. As enacted in 1972, that section addressed the requirements to be imposed on federal licensees whose activities might affect the coastal zone. A federal agency may not issue a "license or permit" for any activity "affecting land or water uses in the coastal zone" without ascertaining that the activity is consistent with the state program or otherwise in the national interest.[17] Each affected State with an approved management program must concur in the issuance of the license or permit; a State's refusal to do so may be overridden only if the Secretary of Commerce finds that the proposed activity is consistent with CZMA's objectives or otherwise in the interest of national security. Significantly, § 307(c)(3) contained no mention of consistency requirements in connection with the sale of a lease.

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[16] Both the original § 307(c)(3) and the amended § 307(c)(3)(B), see *infra*, at 335, and n. 19, expressly address and constrain the actions of federal agencies. "No license or permit shall be granted by the Federal agency until the state . . . has concurred with the applicant's [consistency] certification . . . ." 16 U. S. C. § 1456(c)(3) (1982 ed.). "No Federal official or agency shall grant such person any license or permit for any activity . . . until [the affected] state . . . receives a copy of [the applicant's certification of consistency and concurs in the certification or is overridden by the Secretary of Commerce]." 16 U. S. C. § 1456(c)(3)(B) (1982 ed.). Moreover, in the 1976 CZMA amendment debates Members of Congress uniformly viewed § 307(c)(3) as directly concerned with the consistency obligations of federal agencies. When Congress considered adding the word "lease" to § 307(c)(3), the shared assumption was that consistency requirements in § 307(c)(3) were functionally identical to those of § 307(c)(1). One Senator was of the view that the proposed amendment would "mak[e] it clear that Outer Continental Shelf leasing is a Federal activity subject to the Federal consistency provision . . . ." 121 Cong. Rec. 23075 (1975). Another commented that the addition to § 307(c)(3) would establish that "Federal agencies must conduct their activities consistent with" applicable state management programs. *Id.*, at 23084. The Senate Report stated that the proposed § 307(c)(3) amendment, "[i]n practical terms, . . . means that the Secretary of the Interior would need to seek the certification of consistency from adjacent State governors before entering into a binding lease agreement with private oil companies." S. Rep. No. 94–277, p. 20 (1975). And the House Report stated that the amendment would establish that "the OCS leasing process is indeed a federal action that undoubtedly has the potential for affecting a state's coastal zone and, hence, must conform with approved state coastal management programs." H. R. Rep. No. 94–878, p. 37 (1976); see also *id.*, at 52–53.

In 1976, Congress expressly addressed—and preserved—that omission. Specific House and Senate Committee proposals to add the word "lease" to § 307(c)(3) were rejected by the House and ultimately by the Congress as a whole.[18] It is

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[17] "[A]ny applicant for a required Federal license or permit to conduct an activity affecting land or water uses in the coastal zone . . . shall provide in the application to the licensing or permitting agency a certification that the proposed activity . . . will be conducted in a manner consistent with [the approved state management] program. . . . At the earliest practicable time, the state . . . shall notify the Federal agency concerned that the state concurs with or objects to the applicant's certification. . . . No license or permit shall be granted by the Federal agency until the state . . . has concurred with the applicant's certification . . . unless the Secretary . . . finds . . . that the activity is consistent with the objectives of [CZMA] or is otherwise necessary in the interest of national security." 16 U. S. C. § 1456(c)(3) (1982 ed.).

[18] The bills reported out of House and Senate Committees would have inserted the word "lease" in § 307(c)(3). See H. R. Rep. No. 94-878, pp. 52-53 (1976); S. Rep. No. 94-277, pp. 19-20 (1975). The proposal passed the Senate but was removed on the floor of the House. 122 Cong. Rec. 6128 (1976).

The Conference Committee decided not to introduce "lease" into § 307(c)(3). Instead, the Committee created the new § 307(c)(3)(B). The Conference Report explained:

"The conference substitute follows the Senate bill in amending the Federal consistency requirement [of] section 307(c)(3) . . . . The Senate bill required that each Federal lease (for example, offshore oil and gas leases) had to be submitted to each state with an approved coastal zone manage-surely not for us to add to the statute what Congress twice decided to omit.

Instead of inserting the word "lease" in § 307(c)(3), the House-Senate Conference Committee renumbered the existing § 307(c)(3) as § 307(c)(3)(A), and added a second subparagraph, § 307(c)(3)(B). Respondents apparently concede that of these two subparagraphs, only the latter is now relevant to oil and gas activities on the OCS. Brief for Respondent State of California et al. 44, and n. 76; Brief for Respondent Natural Resources Defense Council, Inc., et al. 7, n. 6. The new subparagraph § 307(c)(3)(B), however, provides only that applicants for federal licenses or permits to explore for, produce, or develop oil or gas on the OCS must first certify consistency with affected state plans.[19] Again, there is no suggestion that a lease sale by Interior requires any review of consistency with state management plans.

B

If the distinction between a sale of a "lease" and the issuance of a permit to "explore for," "produce," or "develop" oil

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ment program for a determination by that state as to whether or not the lease was consistent with its program. The conference substitute further elaborates on this provision and specifically applies the consistency requirement to the basic steps in the OCS leasing process—namely, the exploration, development and production plans submitted to the Secretary of the Interior. This provision will satisfy the state needs for complete information, on a timely basis, about the details of the oil industry's offshore plans." H. R. Conf. Rep. No. 94–1298, p. 30 (1976).

[19] "[A]ny person who submits to the Secretary of the Interior any plan for the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act . . . shall, with respect to any exploration, development, or production described in such plan and affecting any land use or water use in the coastal zone . . . [certify] that each activity . . . complies with [the] state's approved management program . . . . No Federal official or agency shall grant such person any license or permit for any activity . . . until [the state concurs or] . . . the Secretary finds . . . that each activity . . . is consistent with the objectives of [CZMA] or is otherwise necessary in the interest of national security." 16 U. S. C. § 1456(c)(3)(B) (1982 ed.).

or gas seems excessively fine, it is a distinction that Congress has codified with great care. CZMA § 307(c)(3)(B) expressly refers to the Outer Continental Shelf Lands Act of 1953, 67 Stat. 462, as amended, 43 U. S. C. § 1331 *et seq.* (1976 ed., Supp. V) (OCSLA), so it is appropriate to turn to that Act for a clarification of the differences between a lease sale and the approval of a plan for "exploration," "development," or "production."

OCSLA was enacted in 1953 to authorize federal leasing of the OCS for oil and gas development. The Act was amended in 1978 to provide for the "expeditious and orderly development, subject to environmental safeguards," of resources on the OCS. 43 U. S. C. § 1332(3) (1976 ed., Supp. V). As amended, OCSLA confirms that at least since 1978 the sale of a lease has been a distinct stage of the OCS administrative process, carefully separated from the issuance of a federal license or permit to explore for, develop, or produce gas or oil on the OCS.

Before 1978, OCSLA did not define the terms "exploration," "development," or "production." But it did define a "mineral lease" to be "any form of authorization for the exploration for, or development or removal of deposits of, oil, gas, or other minerals." 43 U. S. C. § 1331(c). The pre-1978 OCSLA did not specify what, if any, rights to explore, develop, or produce were transferred to the purchaser of a lease; the Act simply stated that a lease should "contain such rental provisions and such other terms and provisions as the Secretary may prescribe at the time of offering the area for lease." 43 U. S. C. § 1337(b)(4). Thus before 1978 the sale by Interior of an OCS lease might well have engaged CZMA § 307(c)(3)(B) by including express or implied federal approval of a "plan for the exploration or development of, or production from" the leased tract.[20]

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[20] As discussed *infra*, at 339, § 11 of the OCSLA, 43 U. S. C. § 1340 (1976 ed., Supp. V), as amended in 1978, added a requirement for the submission and separate approval of an exploration plan following the

The leases in dispute here, however, were sold in 1981. By then it was quite clear that a lease sale by Interior did *not* involve the submission or approval of "any plan for the exploration or development of, or production from" the leased tract. Under the amended OCSLA, the purchase of a lease entitles the purchaser only to priority over other interested parties in submitting for federal approval a plan for exploration, production, or development. Actual submission and approval or disapproval of such plans occur separately and later.

Since 1978 there have been four distinct statutory stages to developing an offshore oil well: (1) formulation of a 5-year leasing plan by the Department of the Interior; (2) lease sales; (3) exploration by the lessees; (4) development and production. Each stage involves separate regulatory review that may, but need not, conclude in the transfer to lease purchasers of rights to conduct additional activities on the OCS. And each stage includes specific requirements for consultation with Congress, between federal agencies, or with the States. Formal review of consistency with state coastal management plans is expressly reserved for the last two stages.

(1) Preparation of a leasing program. The first stage of OCS planning is the creation of a leasing program. Interior is required to prepare a 5-year schedule of proposed OCS lease sales. 43 U. S. C. § 1344 (1976 ed., Supp. V). During the preparation of that program Interior must solicit comments from interested federal agencies and the Governors of affected States, and must respond in writing to all comments

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purchase of a lease. However, that section made the requirements prospective only, to come into force 90 days after September 18, 1978. 43 U. S. C. § 1340(b) (1976 ed., Supp. V). Similarly, the 1978 OCSLA amendments required oil or gas leases to provide that development and production be conducted only in accordance with a subsequently submitted and approved plan, but extended this requirement only to leases issued after September 18, 1978. 43 U. S. C. § 1351(b) (1976 ed., Supp. V).

or requests received from the State Governors. 43 U. S. C. § 1344(c) (1976 ed., Supp. V). The proposed leasing program is then submitted to the President and Congress, together with comments received by the Secretary from the Governor of the affected State. 43 U. S. C. § 1344(d)(2) (1976 ed., Supp. V).

Plainly, prospective lease purchasers acquire no rights to explore, produce, or develop at this first stage of OCSLA planning, and consistency review provisions of CZMA § 307(c)(3)(B) are therefore not engaged. There is also no suggestion that CZMA § 307(c)(1) consistency requirements operate here, though we note that preparation and submission to Congress of the leasing program could readily be characterized as "initiat[ing] a [s]eries of [e]vents of [c]oastal [m]anagement [c]onsequence." Brief for Respondent State of California et al. 10.

(2) Lease sales. The second stage of OCS planning—the stage in dispute here—involves the solicitation of bids and the issuance of offshore leases. 43 U. S. C. § 1337(a) (1976 ed., Supp. V). Requirements of the National Environmental Policy Act and the Endangered Species Act must be met first. The Governor of any affected State is given a formal opportunity to submit recommendations regarding the "size, timing, or location" of a proposed lease sale. 43 U. S. C. § 1345(a) (1976 ed., Supp. V). Interior is required to accept these recommendations if it determines they strike a reasonable balance between the national interest and the well-being of the citizens of the affected State. 43 U. S. C. § 1345 (c) (1976 ed., Supp. V). Local governments are also permitted to submit recommendations, and the Secretary "may" accept these. 43 U. S. C. §§ 1345(a), (c) (1976 ed., Supp. V). The Secretary may then proceed with the actual lease sale. Lease purchasers acquire the right to conduct only limited "preliminary" activities on the OCS—geophysical and other surveys that do not involve seabed penetrations

greater than 300 feet and that do not result in any significant environmental impacts. 30 CFR § 250.34–1 (1982).

Again, there is no suggestion that these activities in themselves "directly affect" the coastal zone. But by purchasing a lease, lessees acquire no right to do anything more. Under the plain language of OCSLA, the purchase of a lease entails no right to proceed with full exploration, development, or production that might trigger CZMA § 307(c)(3)(B); the lessee acquires only a priority in submitting plans to conduct those activities. If these plans, when ultimately submitted, are disapproved, no further exploration or development is permitted.

(3) Exploration. The third stage of OCS planning involves review of more extensive exploration plans submitted to Interior by lessees. 43 U. S. C. § 1340 (1976 ed., Supp. V). Exploration may not proceed until an exploration plan has been approved. A lessee's plan must include a certification that the proposed activities comply with any applicable state management program developed under CZMA. OCSLA expressly provides for federal disapproval of a plan that is not consistent with an applicable state management plan unless the Secretary of Commerce finds that the plan is consistent with CZMA goals or in the interest of national security. 43 U. S. C. § 1340(c)(2) (1976 ed., Supp. V). The plan must also be disapproved if it would "probably cause serious harm or damage . . . to the marine, coastal, or human environment . . . ." 43 U. S. C. §§ 1334(a)(2)(A)(i), 1340(c)(1) (1976 ed., Supp. V). If a plan is disapproved for the latter reason, the Secretary may "cancel such lease and the lessee shall be entitled to compensation . . . ." 43 U. S. C. § 1340(c)(1) (1976 ed., Supp. V).

There is, of course, no question that CZMA consistency review requirements operate here. CZMA § 307(c)(3)(B) expressly applies, and as noted, OCSLA itself refers to the applicable CZMA provision.

(4) Development and production. The fourth and final stage is development and production. 43 U. S. C. § 1351 (1976 ed., Supp. V). The lessee must submit another plan to Interior. The Secretary must forward the plan to the Governor of any affected State and, on request, to the local governments of affected States, for comment and review. 43 U. S. C. §§ 1345(a), 1351(a)(3) (1976 ed., Supp. V). Again, the Governor's recommendations must be accepted, and the local governments' may be accepted, if they strike a reasonable balance between local and national interests. Reasons for accepting or rejecting a Governor's recommendations must be communicated in writing to the Governor. 43 U. S. C. § 1345(c) (1976 ed., Supp. V). In addition, the development and production plan must be consistent with the applicable state coastal management program. The State can veto the plan as "inconsistent," and the veto can be overridden only by the Secretary of Commerce. 43 U. S. C. § 1351(d) (1976 ed., Supp. V). A plan may also be disapproved if it would "probably cause serious harm or damage . . . to the marine, coastal or human environments." 43 U. S. C. § 1351(h)(1)(D)(i) (1976 ed., Supp. V). If a plan is disapproved for the latter reason, the lease may again be canceled and the lessee is entitled to compensation. 43 U. S. C. § 1351(h)(2)(C) (1976 ed., Supp. V).

Once again, the applicability of CZMA to this fourth stage of OCS planning is not in doubt. CZMA § 307(c)(3)(B) applies by its own terms, and is also expressly invoked by OCSLA.

Congress has thus taken pains to separate the various federal decisions involved in formulating a leasing program, conducting lease sales, authorizing exploration, and allowing development and production. Since 1978, the purchase of an OCS lease, standing alone, entails no right to explore for, develop, or produce oil and gas resources on the OCS. The first two stages are not subject to consistency review; instead, input from State Governors and local governments is solicited by the Secretary of the Interior. The last two stages invite further input for Governors or local governments, but also require formal consistency review. States with approved CZMA plans retain considerable authority to veto inconsistent exploration or development and production plans put forward in those latter stages.[21] The stated reason for this four-part division was to forestall premature litigation regarding adverse environmental effects that all agree will flow, if at all, only from the latter stages of OCS exploration and production.[22]

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[21] OCSLA contains a saving clause that provides: "Except as otherwise expressly provided in this chapter, nothing in this chapter shall be construed to amend, modify, or repeal any provision of [CZMA]." 43 U. S. C. § 1866(a) (1976 ed., Supp. V). Our analysis of CZMA § 307(c)(1) is entirely consistent with this clause. A narrow construction of "directly affecting" is compelled by CZMA's legislative history, standing alone. It is reinforced by CZMA § 307(c)(3), which expressly addresses the consistency review requirements to be imposed on OCS oil and gas programs. Section 307(c)(3) provides for consistency review prior to exploration, development, and production, not prior to lease sales. CZMA itself invokes OCSLA, so it is appropriate to look to that Act for the distinction between lease sales on the one hand, and exploration, development, and production permits on the other. OCSLA confirms that a lease sale is a separate, distinct stage of OCS planning, not to be confused with exploration, development, or production. The 1978 OCSLA amendments are relevant not because they change any part of CZMA, but because they change, or at least substantially clarify, the rights transferred by Interior when a lease is sold.

[22] The House Report accompanying the 1978 OCSLA amendments explained:

"[The consistency review provision imposed at the *production* stage] is intended to provide the mechanism for review and evaluation of, and decision on, development and production in a leased area, after consultation and coordination with all affected parties.

"The committee considers this one of the most important provisions of the 1977 amendments. It provides a means to separate the Federal decision to allow private industry to explore for oil and gas from the Federal decision to allow development and production to proceed if the lessee finds

C

Having examined the coordinated provisions of CZMA § 307(c)(3) and OCSLA we return to CZMA § 307(c)(1).

As we have noted, the logical paragraph to examine in connection with a lease sale is not § 307(c)(1), but § 307(c)(3). Nevertheless, even if OCS lease sales are viewed as involving an OCS activity "conduct[ed]" or "support[ed]" by a federal agency, lease sales can no longer aptly be characterized as "directly affecting" the coastal zone. Since 1978 the sale of a lease grants the lessee the right to conduct only very limited, "preliminary activities" on the OCS. It does not authorize full-scale exploration, development, or production. Those activities may not begin until separate federal approval has been obtained, and approval may be denied on several grounds. If approval is denied, the lease may then be canceled, with or without the payment of compensation to the lessee. In these circumstances, the possible effects on the coastal zone that may eventually result from the sale of a lease cannot be termed "direct."

It is argued, nonetheless, that a lease sale is a crucial step. Large sums of money change hands, and the sale may therefore generate momentum that makes eventual exploration, development, and production inevitable. On the other side, it is argued that consistency review at the lease sale stage is at best inefficient, and at worst impossible: Leases are sold before it is certain if, where, or how exploration will actually occur.

The choice between these two policy arguments is not ours to make; it has already been made by Congress. In the 1978 OCSLA amendments Congress decided that the better course is to postpone consistency review until the two later

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oil and gas. The failure to have such a mechanism in the past has led to extensive litigation prior to lease sales, when onshore and environmental impacts of production activity are not yet known." H. R. Rep. No. 95–590, p. 164 (1977).

stages of OCS planning, and to rely on less formal input from State Governors and local governments in the two earlier ones. It is not for us to negate the lengthy, detailed, and coordinated provisions of CZMA § 307(c)(3)(B), and OCSLA, 43 U. S. C. §§ 1344–1346 and 1351 (1976 ed., Supp. V), by a superficially plausible but ultimately unsupportable construction of two words in CZMA § 307(c)(1).

V

Collaboration among state and federal agencies is certainly preferable to confrontation in or out of the courts. In view of the substantial consistency requirements imposed at the exploration, development, and production stages of OCS planning, Interior, as well as private bidders on OCS leases, might be well advised to ensure in advance that anticipated OCS operations can be conducted harmoniously with state coastal management programs.[23] But our review of the history of CZMA § 307(c)(1), and the coordinated structures of the amended CZMA and OCSLA, persuade us that Congress did not intend § 307(c)(1) to mandate consistency review at the lease sale stage.

Accordingly, the decision of the Court of Appeals for the Ninth Circuit is reversed insofar as it requires petitioners to conduct consistency review pursuant to CZMA § 307(c)(1) before proceeding with Lease Sale No. 53.

It is so ordered.

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[23] In his comments regarding the House's 1976 refusal to add the word "lease" to CZMA § 307(c)(3), Congressman Murphy noted that "even if an organization had a lease it could not do much with it because the licenses and permits are required to deal with the development of oil on the Continental Shelf." 122 Cong. Rec. 6128 (1976).

The California Coastal Commission is also well aware of its power to demand consistency at later stages in OCS planning. In voicing its objections to the sale of the 31 disputed tracts the Commission warned: "Any attempt to explore or develop these tracts will face the strong possibility of an objection to a consistency certification of the Plan of Exploration or Development by the Commission." App. 79.

JUSTICE STEVENS, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

In these cases, the State of California is attempting to enforce a federal statutory right. Its coastal zone management program was approved by the Federal Government pursuant to a statute enacted in 1972. In § 307(c)(1) of that statute, the Coastal Zone Management Act (CZMA), the Federal Government made a promise to California:

> "Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs." 86 Stat. 1285, 16 U. S. C. § 1456(c)(1) (1982 ed.).

The question in these cases is whether the Secretary of the Interior was conducting an activity directly affecting the California Coastal Zone when he sold oil and gas leases in the Pacific Ocean area immediately adjacent to that zone. One would think that this question could be easily answered simply by reference to a question of fact—does this sale of leases directly affect the coastal zone? The District Court made a finding that it did, which the Court of Appeals affirmed, and which is not disturbed by the Court. Based on a straightforward reading of the statute, one would think that that would be the end of the cases.

The Court reaches a contrary conclusion, however, based on either or both of these two theories: (1) § 307(c)(1) only applies to federal activities that take place within the coastal zone itself or in a federal enclave within the zone—it is wholly inapplicable to federal activities on the Outer Continental Shelf (OCS) no matter how seriously they may affect the coastal zone; (2) even if the sale of oil leases by the Secretary of the Interior would have been covered by § 307(c)(1) when the CZMA was enacted in 1972, amendments to an entirely different statute adopted in 1978 mean that the leases cannot directly affect the coastal zone notwithstanding the fact that those amendments merely imposed additional obligations on private lessees and did not purport to cut back on any obligation previously imposed on federal agencies.

The Court's first theory is refuted by the plain language of the 1972 Act, its legislative history, the basic purpose of the Act, and the findings of the District Court. The Court's second theory, which looks at post-1972 legislative developments, is simply overwhelmed by a series of unambiguous legislative pronouncements that consistently belie the Court's interpretation of the intent of Congress.

I

Because there is so much material refuting the Court's reading of the 1972 Act, an index of what is to follow may be useful. I shall first note that the plain language of § 307(c)(1) draws no distinction between activities that take place outside the coastal zone and those that occur within the zone; it is the effect of the activities rather than their location that is relevant. I shall then review the legislative history which demonstrates that the words "directly affecting" were included in the section to make sure that the statute covered activities occurring outside the coastal zone if they are the functional equivalent of activities occurring within the zone. I shall then identify some of the statutory provisions indicating that Congress intended to require long-range, advance planning. I shall conclude Part I with a description of the findings that bring these cases squarely within the congressional purpose.

Plain Language

In statutory construction cases, the Court generally begins its analysis by noting that "[t]he starting point in every case involving construction of a statute is the language itself." *E. g.*, *Watt* v. *Alaska*, 451 U. S. 259, 265 (1981). Not much is said, however, about the plain language of § 307(c)(1) in the opinion of the Court, and no wonder. The words "activities directly affecting the coastal zone" make it clear that § 307(c)(1) applies to activities that take place outside the zone itself as well as to activities conducted within the zone. There are federal enclaves inside the boundaries of the coastal zone that, as a matter of statutory definition, are excluded from the zone itself.[1] Moreover, the ocean areas on the OCS that are adjacent to, and seaward of, the coastal zone are subject to the exclusive jurisdiction of the Federal Government.[2] Quite plainly, the federal activities that may directly affect the coastal zone can be conducted in the zone itself, in a federal enclave, or in an adjacent federal area. The plain meaning of the words thus indicates that the words "directly affecting" were intended to enlarge the coverage of § 307(c)(1) to encompass activities conducted outside as well as inside the zone. In light of this language it is hard to see how the Court can hold, as it does, that federal activities in the OCS can never fall within the statute because they are outside the outer boundaries of the coastal zone.

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[1] Section 304(a) defines the coastal zone as follows:

"(a) The term 'coastal zone' means the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states, and includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches. The zone extends, in Great Lakes waters, to the international boundary between the United States and Canada and, in other areas, seaward to the outer limit of the United States territorial sea. The zone extends inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters. Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents." 86 Stat. 1281, as amended, 16 U. S. C. § 1453(1) (1982 ed.).

[2] See *United States* v. *Maine*, 420 U. S. 515 (1975); 43 U. S. C. §§ 1302, 1332(1) (1976 ed. and Supp. V).

Legislative History

The plain meaning of the Act is confirmed by its legislative history. Both the House and the Senate versions of the CZMA originally applied only to federal agencies conducting "activities in the coastal zone."[3] At the same time, Congress clearly recognized that the most fundamental purpose of the CZMA was "to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations." 86 Stat. 1281, 16 U. S. C. § 1452(1) (1982 ed.). In writing the versions of the CZMA that went to conference, both Houses stated that their purpose was to prevent adverse *effects* on the coastal zone.[4] Yet it plainly would have been impossible to achieve this purpose without considering activities outside of the zone which nevertheless could have a devastating impact on it—activities such as those that led to the 1969 Santa

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[3] See H. R. 14146, 92d Cong., 2d Sess., § 307(c)(1) (1972), reprinted in 118 Cong. Rec. 26502 (1972) ("Each Federal agency conducting or supporting activities in the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs"); S. 3507, 92d Cong., 2d Sess., § 314(b)(1) (1972), reprinted in 118 Cong. Rec. 14190 (1972) ("All Federal agencies conducting or supporting activities in the coastal zone shall administer their programs consistent with approved State management programs except in cases of overriding national interest as determined by the President").

[4] The Senate's version stated that the purpose of a state coastal zone management plan must be "to minimize direct, significant, and adverse impact on the coastal waters . . . ." S. 3507, 92d Cong., 2d Sess., § 304(g) (1972), reprinted in 118 Cong. Rec. 14188 (1972). Plans were required to state "what shall constitute permissible land and water uses within the coastal zone so as to prevent such uses which have a direct, significant, and adverse impact on the coastal waters . . . ." § 305(b)(2), reprinted in 118 Cong. Rec. 14188 (1972). The House bill contained similar language, see H. R. 14146, 92d Cong., 2d Sess., § 305(b) (1972), reprinted in 118 Cong. Rec. 26501 (1972). See also S. Rep. No. 92–753, p. 10 (1972).

Barbara, Cal., oil spill, which occurred in the OCS but which had a devastating impact on the adjacent California coast.[5] When the Conferees adopted the definition of "coastal zone" that excluded federal enclaves, they recognized the need to expand the description of federal activities that should be conducted in a manner that is consistent with an approved state program. The substitution of the words "directly affecting" for the word "in" accomplished this purpose. Thus, if an activity outside the zone has the same kind of effect on the zone as if it had been conducted in the zone, it is covered by § 307(c)(1).[6]

The Court's position seems to be that since neither the Senate nor House versions covered federal activities outside of the coastal zone, the bill that emerged from the Conference Committee could not have either. See *ante*, at 322–324. To construe the Conference substitute otherwise would be to find a "surprising, unexplained, and subsequently unnoticed expansion in the scope of § 307(c)(1)," *ante*, at 322. Not only does that construction ignore the "directly affecting" language used by Congress, but it rests on a demonstrably incorrect assumption as to the scope of the earlier versions of the CZMA.

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[5] The Santa Barbara incident was referred to on several occasions during the consideration of the CZMA. See 118 Cong. Rec. 14180 (1972) (remarks of Sen. Boggs); *id.*, at 26484 (remarks of Rep. Anderson); *id.*, at 26495 (same); *ibid.* (remarks of Rep. Teague); *id.*, at 35550 (remarks of Rep. Anderson).

[6] The Court seems to read this history as indicating that only federal activities in the coastal zone or on federal enclaves may directly affect the zone. See *ante*, at 323–324. If that were a correct reading, § 307(c)(1) would have no application at all in the ocean area adjacent to the coastal zone. None of the litigants has advanced such an improbable construction of "directly affecting." It is perfectly obvious that when Congress adopted language that excluded federal enclaves from the zone, it realized that activities which are conducted outside the zone itself can have the same kind of effect within the zone as an activity conducted in the zone. An oil well adjacent to the zone will affect the zone in precisely the same way whether it is in a federal enclave or in federal water just outside the zone.

The House version of the CZMA clearly recognized that activities outside the coastal zone could have a critical impact upon the coastal zone, and therefore had to be covered by management plans. It defined the coastal zone to extend inland to areas which could have an impact on it, see H. R. 14146, 92d Cong., 2d Sess., § 304(a) (1972), reprinted in 118 Cong. Rec. 26501 (1972), in order to enable the CZMA to achieve "its basic underlying purpose, that is the management and the protection of the coastal waters. It would not be possible to accomplish that purpose without to some degree extending the coverage to the shorelands which have an impact on those waters." H. R. Rep. No. 92–1049, p. 14 (1972). The House bill did not extend the zone seaward because it instead required the Secretary of Commerce to develop a management program for activities on the OCS that was consistent with the management program of the adjacent State. H. R. 14146, 92d Cong., 2d Sess., § 313 (1972), reprinted in 118 Cong. Rec. 26503 (1972); H. R. Rep. No. 92–1049, p. 23 (1972).[7] Section 313 was thus specifically premised on the recognition that federal activities in the OCS, particularly the sale of oil and gas leases, could have a direct impact on the coastal zone.[8] The House further recog-

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[7] The House version provided that the Secretary's management program "shall be coordinated with the [adjacent] coastal state involved." H. R. 14146, 92d Cong., 2d Sess., § 313(b) (1972), reprinted in 118 Cong. Rec 26503 (1972). It further provided: "The Secretary shall, to the maximum extent practicable, apply the program developed pursuant to this section to waters which are adjacent to specific areas in the coastal zone which have been designated by the states for the purpose of preserving or restoring such areas for their conservation, recreational, ecological, or esthetic values." § 313(c), reprinted in 118 Cong. Rec. 26503 (1972).

[8] "Mr. Chairman, of particular interest to me is a subsection, which I authored, designed to protect State-established coastal sanctuaries, such as exists off California, from federally authorized development.

"The State of California in 1955 created five marine sanctuaries to protect the beaches from oil spills. In 1963, two more sanctuaries were created.

"These State-established sanctuaries, which extend from the coastline nized the need to regulate federal OCS activities to protect the coastal zone in § 312 of its bill, which provided for the expansion of coastal zone marine sanctuaries established by state management plans into the OCS, in order to fully protect the coastal zone.[9] The House showed its concern about the impact of federal activities in the OCS on the coastal zone by rejecting an amendment to § 312 which would have made it permissive rather than mandatory for the Federal Government to establish sanctuaries in areas adjacent to state sanctuaries, and another amendment that would have deleted § 312 altogether. See 118 Cong. Rec. 26495–26496 (1972).

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seaward to 3 miles, account for nearly a fourth of the entire California coast.

"However, the Federal Government has jurisdiction outside the State area, from 3 miles to 12 miles at sea. All too often, the Federal Government has allowed development and drilling to the detriment of the State program.

"A case in point is Santa Barbara where California established a marine sanctuary banning the drilling of oil in the area under State authority.

"Yet outside the sanctuary—in the federally controlled area—the Federal Government authorized drilling which resulted in the January 1969 blowout. This dramatically illustrated the point that oil spills do not respect legal jurisdictional lines.

"In order to protect the desires of the citizens of the coastal States who wish to establish marine sanctuaries, I offered a provision which 'requires that the Secretary of Commerce shall, to the maximum extent practicable, apply the coastal zone program to waters immediately adjacent to the coastal waters of a State, which the State has designated for specific preservation purposes.' The Merchant Marine and Fisheries Committee approved this provision." *Id.*, at 26484 (remarks of Rep. Anderson).

[9] "When an estuarine sanctuary is established by a coastal state . . . whether or not Federal funds have been made available for a part of the costs of acquisition, development, and operation, the Secretary, at the request of the state concerned, and after consultation with interested Federal departments and agencies and other interested parties, may extend the established estuarine sanctuary seaward beyond the coastal zone, to the extent necessary to effectuate the purposes for which the estuarine sanctuary was established." H. R. 14146, 92d Cong., 2d Sess., § 312(b) (1972), reprinted in 118 Cong. Rec. 26503 (1972).

Thus it is plainly evident that the House did wish to protect the integrity of state coastal zone management with respect to federal activities in the OCS.

The Senate shared the House's concern that state management plans must apply to federal activities in areas adjacent to the coastal zone. The Senate Report on its version of the CZMA stated that its version was derived from a bill it had reported favorably during the previous year, S. 582.[10] In particular, the 1971 Senate version of the CZMA used exactly the same language in framing the consistency obligation as did the 1972 version.[11] The Report on the 1971 bill construed this language to extend the consistency obligation to federal activities in waters outside of the coastal zone which functionally interact with the zone:

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[10] "During the first session of the 92d Congress, the Subcommittee on Oceans and Atmosphere, formerly the Subcommittee on Oceanography, held an additional three days of hearings during May 1971. Fifteen witnesses were heard and 39 new letters, articles and publications were received for the record, which was published by the Committee as Serial No. 92-15.

"In the ensuing period, S. 582 was redrafted by the Subcommittee, incorporating additional ideas from S. 638 and S. 992, which the Subcommittee felt strengthened the bill. The Subcommittee also drew substantially upon ideas propounded by the Council on Environmental Quality, whose assistance was invaluable. The Subcommittee reported the bill favorably to the Committee on Commerce on August 4, 1971, and on September 30, 1971 the Committee ordered the bill reported favorably with amendments.

"On March 14, 1972, at the request of Senator Hollings, S. 582 was recommitted to the Committee. Changes were made in the bill so as to clear up conflicting matters of jurisdiction, to place limitations on the coastal zone, and to broaden the participation of local governments, interstate agencies and areawide agencies in the preparation and operation of management programs. Additional changes were made to make the bill compatible with proposed land use policy legislation as proposed by the Administration. (See S. 992) Then, on Tuesday, April 11, 1972, the Committee ordered S. 3507 be reported favorably as an original bill." S. Rep. No. 92-753, p. 7 (1972).

[11] The 1971 bill stated: "All Federal agencies conducting or supporting activities in the coastal and estuarine zone shall administer their programs consistent with approved State management programs except in cases of

> "[A]ny lands or waters under Federal jurisdiction and control, where the administering Federal agency determines them to have a functional interrelationship from an economic, social, or geographic standpoint with lands and waters within the territorial sea, should be administered consistent with approved State management programs except in cases of overriding national interest as determined by the President." S. Rep. No. 92–526, p. 20 (1971).[12]

Since the 1972 Senate CZMA used identical language to describe the consistency requirement, and nothing in the 1972 Senate Report indicates that this language should be construed differently than the 1971 language, it follows that the 1972 Senate version placed a consistency obligation upon federal activities in the OCS which affect the coastal zone.

Thus, the Court is simply wrong to say that both versions of the CZMA sent to conference displayed no interest in regulating federal activities occurring outside of the exterior boundaries of the coastal zone. The Conferees' adoption of the "directly affecting" language merely clarified the scope

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overriding national interest as determined by the President." S. 582, 92d Cong., 1st Sess., § 313(b)(1) (1971), reprinted in S. Rep. No. 92–526, p. 7 (1971). The 1972 version is identical, except that what the 1971 version called the "coastal and estuarine zone" the 1972 version shortened to the "coastal zone."

[12] The Report repeated itself, apparently for emphasis: "As noted previously, it is intended that any lands or waters under Federal jurisdiction and control, within or adjacent to the coastal and estuarine zone, where the administering Federal agency determines them to have a functional interrelationship from an economic, social, or geographic standpoint with lands and waters within the coastal and estuarine zone, should be administered consistent with approved State management programs." *Id.*, at 30.

of the consistency obligation. The House surrendered the requirements that the Federal Government develop its own management plan for OCS activities and that federal lands within the coastal zone be included in the zone, but in return ensured that any federal activities "directly affecting" the coastal zone would be subject to the consistency requirement of § 307(c)(1). The only explanations of this compromise to be found in the legislative history can be briefly set out. The Conferees wrote:

> "[A]s to Federal agencies involved in *any* activities directly affecting the state coastal zone and any Federal participation in development projects in the coastal zone, *the Federal agencies must make certain that their activities are to the maximum extent practicable consistent with approved state management programs.* In addition, similar consideration of state management programs must be given in the process of issuing Federal licenses or permits for activities affecting State coastal zones. The Conferees also adopted language which would make certain that there is no intent in this legislation to change Federal or state jurisdiction or rights in specified fields, including submerged lands." H. R. Conf. Rep. No. 92–1544, p. 14 (1972) (emphasis supplied).

Senator Hollings, the floor manager of the CZMA, said when he presented the Conference Report to the Senate: "The bill provides States with national policy goals to control those land uses which have a direct and significant impact upon coastal waters." 118 Cong. Rec. 35459 (1972). That is the entire history of the Conference compromise. There is not the slightest indication that Congress intended to adopt the strange rule which the Court announces today—that OCS leasing cannot be subject to consistency requirements. To the contrary, these statements indicate that *any* federal activity is covered as long as it directly affects the coastal zone. The Conferees' reference to federal rights in "submerged lands" further indicates that it recognized that the statute could be applied to the OCS. The inescapable conclusion is that §§ 312 and 313 were deleted precisely because § 307(c)(1) had been strengthened so as to protect the coastal zone from federal OCS activities, which obviated the need for these sections. There is no indication whatsoever that the deletion occurred because Congress rejected any application of state management plans to federal activities in the OCS.[13]

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[13] There is not a word in the Conference Report on the CZMA indicating that the Conferees rejected the concept that the coastal zone be protected from federal OCS activities through consistency review. The Court relies on Representative Anderson's statement concerning the Conference Report, *ante*, at 328, but in fact he spoke only with reference to the "provision [that] would have required the Secretary to apply the coastal zone program to waters immediately adjacent to the coastal waters of a State, which that State has designated for specific preservation purposes." 118 Cong. Rec. 35549–35550 (1972). His remarks did not concern the scope of § 307(c)(1). Moreover, with respect to § 313 the Conferees indicated that it was deleted only because "the provisions relating thereto did not prescribe sufficient standards or criteria [for coastal management] and would create potential conflicts with legislation already in existence concerning Continental Shelf resources." H. R. Conf. Rep. No. 92–1544, p. 15 (1972). As for § 312, the objection to it was not that it applied state management plans to the OCS; in fact it did not. The objections were of a much different nature—concern that § 312 might automatically foreclose OCS development without judicial or administrative review, see 118 Cong. Rec. 26495 (1972) (remarks of Rep. Clark), and that it duplicated existing programs which already achieved the same purpose. *Id.*, at 26495–26496 (remarks of Rep. Kyl). All the Conferees said about their reasons for rejecting § 312 was: "[T]he need for such provisions appears to be rather remote and could cause problems since they would extend beyond the territorial limits of the United States." H. R. Conf. Rep. No. 92–1544, pp. 14–15 (1972).

The Court also relies on the Senate's rejection of an amendment which would have required the Federal Government to submit leasing proposals to affected States for approval, and the Conferees' rejection of a provision of the Senate version of the CZMA providing for a study of the environmental hazards attendant to drilling in the Atlantic OCS. *Ante*, at 329–330, In sum, the substitution of the words "directly affecting the coastal zone" for the words "in the coastal zone" plainly effectuated the congressional intent to cover activities outside the zone that are the functional equivalent of activities within the zone, thereby addressing the concern of both Houses that the consistency requirement extend to federal OCS activities. There is simply no evidence that § 307(c)(1) was not intended to reach federal OCS activities which directly affect the coastal zone.

Purposes of the CZMA

An examination of the underlying purposes of the CZMA confirms that the most obvious reading of § 307(c)(1), which

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n. 14. As for the Senate amendment, the objection to it had nothing to do with whether consistency obligations applied to federal OCS activity. The objections centered around the veto it gave to the States. Senator Hollings said: "This amendment provides the Governor would have a veto over such matters. I do not think the Senate wants to go that far. The amendment comes without public hearing and full consideration, which we have not had the benefit of." 118 Cong. Rec. 14184 (1972). Then, Senator Moss pointed out that a study of this problem was then underway in the Committee on Interior and Insular Affairs. *Ibid.* It was for that reason, and that reason alone, that the sponsor of the amendment voluntarily withdrew it: "I am happy that these hearings and studies are continuing. I believe and hope they will shed full light on this important subject so that the Senate can give the fullest consideration in light of these hearings and further studies. Mr. President, with the chairman's permission, I ask unanimous consent to withdraw the amendment." *Ibid.* (remarks of Sen. Boggs). As for the study in the Senate version, S. 3507, 92d Cong., 2d Sess., § 316(c)(1) (1972), reprinted in 118 Cong. Rec. 14191 (1972), it was deleted in conference for no other reason than that it was nongermane. *Id.*, at 35547 (remarks of Rep. Downing). Moreover, the Court misstates the objections to this provision. Senators Stevens and Moss objected only because they thought the study should also produce recommendations as to how to eliminate the environmental hazards posed by OCS drilling. See *id.*, at 14180 (remarks of Sen. Stevens). The sponsor, Senator Pell, offered an amendment providing for such recommendations, and then both Senators withdrew their objections to the study. See *id.*, at 14181 (remarks of Sen. Stevens); *id.*, at 14181–14182 (remarks of Sen. Moss).

would apply its consistency obligation to federal OCS leasing that directly affects the coastal zone, is fully justified.

The congressional findings in § 302 of the CZMA first identify the "national interest in the effective management, beneficial use, protection, and development of the coastal zone," 86 Stat. 1280, 16 U. S. C. § 1451(a) (1982 ed.), and then recite the various conflicting demands on the valuable resources in such zones, including those occasioned by the "extraction of mineral resources and fossil fuels." Congress found that special natural and scenic characteristics are "being damaged by ill-planned development" and that "present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate." §§ 1451(g) and (h). Finally, Congress found that the effective protection of resources in the coastal zone required the development of "land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance." § 1451(i). The declaration of national policy in § 303 of the 1972 CZMA unambiguously exhorted "all Federal agencies engaged in programs affecting the coastal zone to cooperate and participate with state and local governments and regional agencies in effectuating the purposes of this title." 86 Stat. 1281. The policy declaration concluded:

> "With respect to implementation of such management programs, it is the national policy to encourage cooperation among the various state and regional agencies including establishment of interstate and regional agreements, cooperative procedures, and joint action particularly regarding environmental problems." *Ibid.*

These provisions surely indicate a congressional preference for long-range planning and for close cooperation between federal and state agencies in conducting or supporting activities that directly affect the coastal zone.[14] Statutes should be construed in a manner consistent with their underlying policies and purposes. *E. g., FBI* v. *Abramson*, 456 U. S. 615, 625, and n. 7 (1982); *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 18–19 (1981); *Philbrook* v. *Glodgett*, 421 U. S. 707, 713 (1975). By applying the consistency obligation to the first critical step in OCS development, the decision to lease, the statute is construed in a manner consistent with its underlying purpose.

The majority's construction of § 307(c)(1) is squarely at odds with this purpose. Orderly, long-range, cooperative planning dictates that the consistency requirement must apply to OCS leasing decisions. The sale of OCS leases involves the expenditure of millions of dollars.[15] If exploration and development of the leased tracts cannot be squared with the requirements of the CZMA, it would be in everyone's interest to determine that as early as possible. On the other hand, if exploration and development of the tracts would be consistent with the state management plan, a preleasing consistency determination would provide assurances to prospective purchasers and hence enhance the value of the tracts to the Federal Government and, concomitantly, the public. Advance planning can only minimize the risk of either loss or inconsistency that may ultimately confront all interested parties.[16] It is directly contrary to the legislative scheme not to make a consistency determination at the earliest possible point.[17] It is especially incongruous since the Court agrees that all federal activity "in" the coastal zone is subject to consistency review. If activity in the OCS directly affects the zone—if it is in fact the functional equivalent of activity "in" the zone—it is inconceivable that Congress would have wanted it to be treated any differently.

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[14] Construing the CZMA to begin federal-state cooperation at the OCS leasing stage enhances such long-range planning and maximizes cooperation. Indeed, the 1980 House Report on the CZMA stated that Congress intended consistency review to apply at the OCS leasing stage for precisely this reason:

"The benefits of this [construction] are significant. First, it fosters consultation between Federal and State agencies at the earliest practicable time. This, in turn, enhances the ability of the States to plan for and manage the coastal zone effects which are directly linked to Federal commitment of resources for Federal activities likely to lead to results inconsistent with the requirements of approved State programs.

"Secondly, broad opportunities for States to influence Federal activities enhances the incentive of the consistency provisions, thereby reinforcing voluntary State participation in the national program. Finally, an expansive interpretation of the threshold test is compatible with the amendment to section 303 calling for Federal agencies and others to participate and cooperate in carrying out the purposes of the act." H. R. Rep. No. 96–1012, pp. 34–35 (1980).

[15] In the lease sale at issue in this case, $220 million was bid on the disputed tracts.

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[16] Petitioners complain that at the leasing stage there may be inadequate information on which to base a consistency determination. The applicable regulations dispose of this objection. While they require a consistency determination at the earliest possible time, the determination need not be made until sufficient information is developed to make a consistency determination practicable. See 15 CFR § 930.34(b) (1983). The regulations also permit consistency determinations to be made in phases as new information develops. See § 930.37(c).

[17] In this connection the arrangement of the four subparagraphs of § 307 is instructive. That section obligates four categories of parties to conform their activities, to the maximum extent practicable, with approved state management programs. The four categories are (1) federal agencies conducting or supporting activities directly affecting the coastal zone; (2) federal agencies undertaking development projects in the coastal zone; (3) private parties who apply for a license or permit to conduct activities in the coastal zone; and (4) state and local governments submitting applications for federal assistance under programs affecting the coastal zone. Neither subparagraph (2) nor (4) has any application to the case before us. It is subparagraph (3), that requires private parties to comply with state programs. Unless subparagraph (1) applies to the Secretary of the Interior, Congress simply omitted entirely the federal activity of selecting the tracts that will be leased from the conformity requirement. If lessees must ultimately conform their activities, to the maximum extent practicable, with the approved state programs, it is difficult to understand why Congress would not have wanted the original planning that preceded the lease sales also to be consistent with the approved program.

The *only* federal activity that ever occurs with respect to OCS oil and gas development is the decision to lease; all other activities in the process are conducted by lessees and not the Federal Government. If the leasing decision is not subject to consistency requirements, then the intent of Congress to apply consistency review to federal OCS activities would be defeated and this part of the statute rendered nugatory. Such a construction must be rejected. See *American Textile Mfrs. Institute, Inc.* v. *Donovan,* 452 U. S. 490, 513 (1981); *Mercantile Nat. Bank* v. *Langdeau,* 371 U. S. 555, 560 (1963); *United States* v. *Shirey,* 359 U. S. 255, 259–260 (1959); *United States* v. *Harriss,* 347 U. S. 612, 622–623 (1954); *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 392 (1940).[18]

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[18] My view, unlike the Court's, is consistent with that of the agency charged by Congress with administering the CZMA, the National Oceanic and Atmospheric Administration (NOAA). While the majority correctly points out that NOAA has waffled on the specific issue of whether there should be a special rule for OCS oil and gas leasing, *ante,* at 320–321, n. 6, it has consistently rejected the majority's position that federal activities in the OCS need not be evaluated to see if they directly affect the coastal zone. To the contrary, NOAA has agreed with the position formerly taken by the Department of Justice (which itself later waffled on this issue, see n. 35, *infra*), that the question whether OCS leasing activity is subject to consistency review is one of fact to be decided on a case-by-case basis. See 44 Fed. Reg. 37142 (1979). The NOAA regulation on this subject (which remains in effect) states: "Federal activities outside of the coastal zone (e. g., on excluded Federal lands, on the Outer Continental Shelf, or landward of the coastal zone) are subject to Federal agency review to determine whether they directly affect the coastal zone." 15 CFR § 930.33(c) (1983). NOAA also urged federal agencies "to construe liberally the 'directly affecting' test in borderline cases so as to favor inclusion of Federal activities subject to consistency review." 44 Fed. Reg. 37146–37147 (1979).

The Direct Effects

The lease sales at issue in these cases are in fact the functional equivalent of an activity conducted in the zone. There is no dispute about the fact that the Secretary's selection of lease tracts and lease terms constituted decisions of major importance to the coastal zone. The District Court described some of the effects of those decisions:

> "For example, a reading of the notice itself reveals some of the many consequences of leasing upon the coastal zone. The 'Notice of Oil and Gas Lease Sale No. 53 (Partial Offering)', as published in the Federal Register, announced ten stipulations to be applied to federal lessees. The activities permitted and/or required by the stipulations result in direct effects upon the coastal zone. Stipulation No. 4 sets forth the conditions for operation of boats and aircraft by lessees. Stipulation No. 6 states the conditions under which pipelines will be required; the Department of Interior, as lessor, specifically reserves the right to regulate the placement of 'any pipeline used for transporting production to shore'. Lessees must agree, pursuant to stipulation No. 1, to preserve and protect biological resources discovered during the conduct of operations in the area.
>
> "The Secretarial Issue Document ('SID'), prepared in October 1980 by the Department of Interior to aid the Secretary in his decision, contains voluminous information indicative of the direct effects of this project on the coastal zone. For instance, the SID contains a table showing the overall probability of an oilspill impacting a point within the sea otter range during the life of the project in the northern portion of the Santa Maria Basin to be 52%. Both the SID and the EIS [Environmental Impact Statement] contain statistics showing the likelihood of oilspills during the life of the leases; based on the unrevised USGS estimates, 1.65 spills are expected during the project conducted in the Santa Maria subarea.

According to the SID, the probability of an oilspill is even higher when the revised USGS figures are utilized.

". . . Both documents refer to impacts upon air and water quality, marine and coastal ecosystems, commercial fisheries, recreation and sportfishing, navigation, cultural resources, and socio-economic factors. For instance, the EIS states that '[n]ormal offshore operations would have unavoidable effects . . . on the quality of the surrounding water'. Pipelaying, drilling, and construction, chronic spills from platforms, and the discharge of treated sewage contribute to the degradation of water quality in the area. As to commercial fisheries, drilling muds and cuttings 'could significantly affect fish and invertebrate populations'; the spot prawn fishery in the Santa Maria Basin is particularly vulnerable to this physical disruption. In reference to recreation and sportfishing, the EIS indicates the possibility of adverse impacts as a result of the competition for land between recreation and OCS-related onshore facilities as a result of the temporary disruption of recreation areas caused by pipeline burial. There are the additional risks of 'the degradation of the aesthetic environment conducive to recreation and the damage to recreational sites as a result of an oil spill'. Another impact on the coastal zone will occur as a result of the migration of labor into the area during the early years of oil and gas operations. Impacts on the level of employment and the size of the population in the coastal region are also predicted.

"The SID notes that there are artifacts of historic interest as well as aboriginal archaeological sites reported in the area of the Santa Maria tracts. The FWS and NMFS biological opinions, appended to the SID, indicate the likelihood that development and production activities may jeopardize the existence of the southern sea otter and the gray whale.

"These effects constitute only a partial list. Further enumeration is unnecessary. The threshold test under

> § 307(c)(1) would in fact be satisfied by a finding of a single direct effect upon the coastal zone. Although the evidence of direct effects is substantial, such a showing is not required by the CZMA." 520 F. Supp. 1359, 1380–1382 (CD Cal. 1981) (footnotes and citations omitted).

The Court of Appeals predicated its conclusion that the lease sale in these cases directly affects the coastal zone on these findings. It wrote:

> "We agree that the lease sale in this case directly affects the coastal zone. These direct effects of Lease Sale 53 on California's coastal zone are detailed by the district court. We need not repeat them here. It is enough to point out that decisions made at the lease sale stage in this case establish the basic scope and charter for subsequent development and production. Prior to the sale of leases, critical decisions are made as to the size and location of the tracts, the timing of the sale, and the stipulations to which the leases would be subject. These choices determine, or at least influence, whether oil will be transported by pipeline or ship, which areas of the coastal zone will be exposed to danger, the flow of vessel traffic, and the siting of on-shore construction.
>
> "Under these circumstances Lease Sale 53 established the first link in a chain of events which could lead to production and development of oil and gas on the individual tracts leased. This is a particularly significant link because at this stage all the tracts can be considered together, taking into account the cumulative effects of the entire lease sale, whereas at the later stages consistency determinations would be made on a tract-by-tract basis under section 307(c)(3)." 683 F. 2d 1253, 1260 (CA9 1982) (citations omitted).

Neither petitioners nor the Court challenges these findings, which clearly state that the oil and gas lease sale at issue here will directly affect the coastal zone. Oil and gas exploration and development are the expected and desired results of the leasing decision which respondents seek to have reviewed under § 307(c)(1), and their impact on the coastal zone will be undeniably significant. Moreover, the findings indicate some of those impacts will occur almost immediately, prior to review under the Outer Continental Shelf Lands Act (OCSLA), and can never be reviewed adequately if they are not reviewed now.[19]

In my judgment these rather sensible appraisals of the probable consequences of the lease sale are entirely consistent with the congressional intent reflected in § 307(c)(1). It cannot be denied that in reality OCS oil and gas leasing "directly" looks toward development of the OCS, and the consequences for the coastal zone that the District Court found development would entail. Development is the expected consequence of leasing; if it were not, purchasers would never commit millions of dollars to the acquisition of leases. Congress views leasing in exactly this way; it has defined the lease acquired by purchasers as a "form of authorization . . . which authorizes exploration for, and development and production of, minerals . . . ." 92 Stat. 632, 43 U. S. C. § 1331(c) (1976 ed., Supp. V). As the Court of Appeals observed, leasing sets into motion a chain of events designed and intended to lead to exploration and development. When the intended and most probable consequence of a federal activity is oil and gas production that will dramatically affect the adjacent coastal zone, that activity is one "directly affecting" the coastal zone within the meaning of § 307(c)(1).

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[19] The California Coastal Commission, the state agency responsible for the administration of the state management plan, made this same point in objecting to the lease sale at issue here. "The Commission's objections to Lease Sale 53 cannot be resolved later at the plan of exploration stage because they involve such major concerns as the lack of onshore facilities, land, and population that can accommodate oil development." App. 118. The Commission believed that inclusion of four specific areas in the sale is inconsistent with its management plan because (1) it leases tracts that are close to areas considered marine sanctuaries or marine resource areas which must be protected from development under the state plan, (2) it will require transportation of oil through the range of the endangered sea otter, which is an environmentally sensitive area that must be protected from such transportation under the state plan, (3) it would affect the scenic and visual qualities of protected recreational areas, (4) it will require the construction of facilities that are not sufficiently justified in terms of the "public welfare" as defined by the plan, and (5) there was not sufficient planning for future demands on coastal resources as required by the state plan. *Id.*, at 120–132. The area of dispute involves 29 of 111 tracts proposed for leasing containing about 8 percent of the oil reserves projected from the sale area. *Id.*, at 148. Prior to this sale, the Commission had concurred in 26 out of 27 OCS lease sales proposed by the Department of the Interior. *Id.*, at 117–120, 154.

II

The Court's holding rests, in part, on selections from legislative developments subsequent to the enactment of the CZMA in 1972. In my view the 1978 amendment to the OCSLA on which the Court relies lends no support to its reading of § 307(c)(1) of the CZMA. On the contrary, a fair review of the post-1972 history reveals such a dramatically different congressional understanding of the meaning of its own work product that it merits a rather detailed treatment. I shall comment on this history in chronological order.

The 1976 Amendment to CZMA

The CZMA was amended in 1976. One of the primary purposes for this legislation was the recognition that OCS leasing has a dramatic impact on the coastal zone. The 1976 legislation created a program of federal financial aid to coastal areas in order to help them deal with the impact of OCS leasing. The amount of money each State received was keyed to the amount of adjacent OCS acreage that had been leased by the Federal Government. 90 Stat. 1019–1028, 16 U. S. C. § 1456a (1982 ed.). This provision was added precisely because Congress recognized that OCS leasing could dramatically affect the adjacent coastal zone, not only environmentally but socially and economically. See S. Rep. No. 94–277, pp. 10–19 (1975); H. R. Rep. No. 94–878, pp. 13, 15–17 (1976);[20] 121 Cong. Rec. 23055–23056 (1975) (remarks of Sen. Stevens); *id.*, at 23060 (remarks of Sen. Jackson); *id.*, at 23065 (remarks of Sen. Magnuson); 122 Cong. Rec. 6111–6112 (1976) (remarks of Rep. Sullivan); *id.*, at 6112 (remarks of Rep. Du Pont); *id.*, at 6113 (remarks of Rep. Mosher); *id.*, at 6114 (remarks of Rep. Murphy); *id.*, at 6117 (remarks of Rep. Young); *id.*, at 6119 (remarks of Rep. Lagomarsino); *id.*, at 6120 (remarks of Rep. Hughes); *id.*, at 6121–6122 (remarks of Rep. Drinan).[21] This congressional recognition completely undermines the Court's position that OCS oil and gas leasing can never directly affect the coastal zone.

Both the Senate and House versions of the 1976 amendments reported out of committee explicitly applied the consistency requirement of § 307 to OCS oil and gas leasing. See S. 586, 94th Cong., 1st Sess., § 102(12) (1975), reprinted in S. Rep. No. 94–277, p. 59 (1975);[22] H. R. 3981, 94th Cong., 2d Sess., § 2(15) (1976), reprinted in H. R. Rep. No. 94–878, p. 4 (1976). The significant point here is that at every opportunity, Congress indicated that all it was doing by these provisions was restating what had been its original intent in the 1972 CZMA. For example, the Senate Report stated:

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[20] In fact, the House Report contains an attachment which details at some length the impacts of OCS oil and gas leasing on the coastal zone. See H. R. Rep. No. 94–878, pp. 119–126 (1976).

[21] For additional statements demonstrating the effects of leasing decisions on the coastal zone, see Congressional Research Service, Effects of Offshore Oil and Natural Gas Development on the Coastal Zone, A Study Prepared for the Ad Hoc Select Committee on Outer Continental Shelf, 94th Cong., 2d Sess., 93 (Comm. Print 1976); Office of Technology Assessment, Offshore Oil and Gas Development, A Study for the Ad Hoc Select House Committee on Outer Continental Shelf, 95th Cong., 1st Sess., 155–157 (Comm. Print 1977).

[22] See also S. Rep. No. 94–277, pp. 19–20 (1975).

> "Section 307 is the portion of the Act which has come to be known as the 'Federal consistency' section. It assures that once State coastal zone management programs are approved and a rational management system for protecting, preserving, and developing the State's coastal zone is in place (approved), the Federal departments, agencies, and instrumentalities will not violate such system but will, instead, conduct themselves in a manner consistent with the States' approved management program. *This includes conducting or supporting activities in or out of the coastal zone which affect that area. . . .* As energy facilities have been focused upon more closely recently, the provisions of section 307 for the consistency of Federal actions with the State coastal zone management programs has *[sic]* provided assurance to those concerned with the coastal zone that the law already provides an effective mechanism for guaranteeing that Federal activities, including those supported by, and those carried on pursuant to, Federal authority (license, lease, or permit) will accord with a rational management plan for protection, preservation and development of the coastal zone. *One of the specific federally related energy problem areas for the coastal zone is, of course, the potential effects of Federal activities on the Outer Continental Shelf beyond the State's coastal zones*, including Federal authorizations for non-Federal activity, but *under the act as it presently exists*, as well as the S. 586 amendments, if the activity may affect the State coastal zone and it has an approved management program, the consistency requirements do apply." S. Rep. No. 94–277, *supra*, at 36–37 (emphasis supplied).[23]

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[23] See also *id.*, at 52–53.

Similarly, the House Report states:

> "Specifically what the section does is add the word 'lease' to 'licenses and permits' in section 307(c)(3). This clarifies the scope of the coverage of those federal actions which must be certified as complying with a state's approved coastal management program. The Committee felt, because of the intense interest in the matter on the part of a number of states, it would make explicit its view that *federal leasing is an activity already covered by section 307 of the Act.*
>
> "To argue otherwise would be to maintain that a federal permit for a wastewater discharge, for example, must be certified by the applicant to be in compliance with a state program, the state being given an opportunity to approve or disapprove of the proposal, while a federal lease for an Outer Continental Shelf tract does not have to so certify. *Given the obvious impacts on coastal lands and waters which will result from the federal action to permit exploration and development of offshore petroleum resources, it is difficult to imagine that the original intent of the Act was not to include such a major federal coastal action within the coverage of 'federal consistency.'*" H. R. Rep. No. 94–878, *supra*, at 52 (emphasis supplied).[24]

Along the same lines, the Report also stated that "the Committee wants to assure coastal states in frontier areas that the OCS leasing process is indeed a federal action that undoubtedly has the potential for affecting a state's coastal zone and, hence, must conform with approved state coastal management programs." *Id.*, at 37. Statements to similar effect were made by sponsors of the legislation on the floors of both Houses.[25]

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[24] The Senate Report also stated: "There is very little coordination or communication between Federal agencies and the affected coastal States prior to major energy resource development decisions, *such as the decision to lease large tracts of the OCS for oil and gas* . . . . Full implementation of the Coastal Zone Management Act of 1972 and recognition of its capability to solve energy-related conflicts could go far to institute the broad objectives of Federal-State cooperative planning envisioned by the framers of the act." *Id.*, at 3 (emphasis supplied).

Though the explicit reference to OCS leasing was deleted by the Conferees, their Report indicates that the reason for the deletion was not disagreement with the concept of applying § 307 to OCS leasing, but rather to supplement that requirement by applying consistency to other stages in the process as well.[26] The subsequent debates on the Conference Report evince no retreat from the position that OCS leasing should be consistent with state management programs. In light of the widespread agreement by Congress in 1976 that OCS leasing was already subject to consistency review under the 1972 CZMA, the logical explanation for the Conferees' action is simply that they saw no need to amend the CZMA since everyone agreed that it already applied to OCS oil and gas leasing. The only need was to further extend consistency review to subsequent stages in the process. This view is explicitly supported by the House's consideration of the amendments, where it was made clear that Congress believed that OCS leasing was subject to consistency requirements. Representative Hughes said:

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[25] See 121 Cong. Rec. 23075 (1975) (remarks of Sen. Tunney); *id.*, at 23082 (remarks of Sen. Kennedy); *id.*, at 23084 (remarks of Sen. Williams); 122 Cong. Rec. 6117 (1976) (remarks of Rep. Forsythe). Similar statements were made emphasizing the breadth of the consistency requirement. See, *e. g.*, *id.*, at 6112 (remarks of Rep. Du Pont) ("Once a State has an approved coastal zone management plan in place, all subsequent Federal activities which affect the coastal zone must be found to be consistent with adopted State management programs"); *id.*, at 6113 (remarks of Rep. Lent) (The 1972 CZMA "provides for the representation of local, State, and regional interests . . . in the making of decisions affecting the coastal zone areas").

[26] "The Senate bill required that each Federal lease (for example, offshore oil and gas leases) had to be submitted to each state with an approved coastal zone management program for a determination by that state as to whether or not the lease was consistent with its program. The conference substitute further elaborates on this provision and specifically applies the consistency requirement to the basic steps in the OCS leasing process—namely, the exploration, development and production plans submitted to the Secretary of the Interior." H. R. Conf. Rep. No. 94–1298, p. 30 (1976).

> "I am disappointed, however, that the amendment offered by Mr. DU PONT to delete the provision requiring that Federal offshore leasing be consistent with State coastal zone management plans has been agreed to. I nevertheless rely upon the record established during today's debate to show that *it is the intent of this legislation that offshore leasing not be in conflict with State management plans.*" 122 Cong. Rec. 6120 (1976) (emphasis supplied).[27]

The failure of the Conferees to include the proposed language in the CZMA is all the more illuminating in light of the fact that the proposal before the Conferees was to amend § 307(c)(3), which details the consistency obligations of private lessees. This proposal was entirely irrelevant to the obligations of the Secretary of the Interior since that subsection does not apply to the Secretary. Thus, the Conferees simply saw no reason to add language covering OCS leasing to subsection (c)(3) when there was agreement that it was already covered by (c)(1).[28] In any event, whatever the ex-

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[27] Representative Du Pont himself stated that he also believed that OCS leasing was subject to consistency requirements. See 122 Cong. Rec. 6128 (1976).

[28] This observation was later made in a statement signed by one of the principal sponsors of the 1976 legislation, Representative Studds.

"Nowhere, in this entire set of deliberations [in 1976], was there any explilct *[sic]* or implicit reference to consistency decisions by the Department of the Interior in its pre-lease activity pursuant to Section 307(c)(1). The focus was on the proper time for a state to certify a private company's activity—not on the federal agency's obligations under Section 307(c)(1).

"The deletion of 'lease' from Section 3[0]7(c)(3) was an agreement by the Congress that a State would have better information on which to base a planation for the Conferees' failure to amend § 307(c)(3), the legislative history contains no ambiguities on one point—everyone to address the issue agreed that § 307(c)(1) already applied to federal OCS oil and gas leasing decisions. This is not merely "postenactment" legislative history, for this was a central premise on which Congress *legislated* when it decided that § 307 need be extended only to subsequent stages in the process of oil and gas development.

The 1978 Amendments to OCSLA

In 1978, Congress passed the Outer Continental Shelf Lands Act Amendments, 92 Stat. 629. The majority relies on these Amendments, concluding that since they require federal approval prior to exploration or development by OCS lessees, they make it clear that mere OCS leasing cannot invoke the consistency requirement of § 307(c)(1) of the CZMA. *Ante*, at 337–340. After all, as the Court recites, these leases are subject to cancellation and most of the specific activities contemplated by the leases must be approved before they take place. At most, however, this simply raises a factual question that the District Court has answered in these cases—does the necessity for approval of exploration and development under OCSLA mean that the leasing decision does not "directly affect" the coastal zone because of the contingent nature of the leasing? Posing that question in no sense obviates the need for the factual analysis demanded by § 307(c)(1). The question whether the leasing decision "directly affects" the coastal zone must still be confronted.

This is made clear by the text of the OCSLA Amendments, which explicitly preserves the pre-existing provisions of the

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307(c)(3) decision later in the process—i. e., at the exploration and development stage—than when the oil company simply had been awarded a lease. Such deletion, however, had absolutely no reference to the range of pre-leasing decisions made by the Interior Department and no implication is warranted with respect to the Section 307(c)(1) issue here." H. R. Rep. No. 97–269, p. 14 (1981) (additional views of Reps. Studds and D'Amours).

CZMA. "Except as otherwise expressly provided in this Act, nothing in this Act shall be contrued to amend, modify, or repeal any provision of the Coastal Zone Management Act of 1972 . . . ." 92 Stat. 698, 43 U. S. C. § 1866(a) (1976 ed., Supp. V). Moreover, the legislative history of this provision indicates that it was intended to *require* consistency review of federal OCS leasing activity. In the only discussion of this question during the entire consideration of the OCSLA Amendments, the House Report[29] made it clear that the consistency obligation of the CZMA would continue to apply to OCS leasing decisions.

> "The committee is aware that under the Coastal Zone Management Act of 1972, as amended in 1976 (16 U. S. C. 1451 et seq.), certain OCS activities *including lease sales* and approval of development and production plans must comply with 'consistency' requirements as to coastal zone management plans approved by the Secretary of Commerce. Except for specific changes made by Titles IV and V of the 1977 Amendments, nothing in this act is intended to amend, modify, or repeal any provision of the Coastal Zone Management Act. Specifically, nothing is intended to alter procedures under that Act for consistency once a State has an approved Coastal Zone Management Plan." H. R. Rep. No. 95–590, p. 153, n. 52 (1977) (emphasis supplied).[30]

One could not ask for a more explicit indication of legislative intent. The Court can find no indication of any intent to the contrary. Thus, the premise of the 1978 legislation, like the 1976 amendment to the CZMA, was that consistency review would be applied to OCS leasing.

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[29] The Report also incorporates by reference the earlier Congressional Research Service report, cited in n. 21, *supra*, detailing the impact of OCS leasing decisions on the coastal zone. See H. R. Rep. No. 95–590, p. 55, n. 1 (1977).

[30] See also 124 Cong. Rec. 2057–2058 (1978) (remarks of Rep. Murphy) ("I want to assure my colleagues that we are simply making sure that the provisions of the 1976 Coastal Zone Management Act consistency amendments will continue to operate in these revised OCS procedures").

Even more important is § 18 of the OCSLA, 92 Stat. 649, 43 U. S. C. § 1344 (1976 ed., Supp. V), which governs the OCS leasing program. Subsection (f) provides, in pertinent part: "The Secretary shall, by regulation, establish procedures for . . . consideration of the coastal zone management program being developed or administered by an affected coastal State pursuant to Section 1454 or 1455 of title 16 [the CZMA]." This provision was added "for coordination of the [leasing] program with management programs and consistency requirements established pursuant to the Coastal Zone Management Act of 1972." H. R. Rep. No. 95–590, *supra*, at 151; S. Rep. No. 95–284, p. 77 (1977).[31] Section 18 of the OCSLA makes it clear, if it were not previously, that state coastal management plans must be considered by the Secretary at the OCS leasing stage.[32] Thus, both the saving clause and § 18(f) establish that Congress intended that consistency determination under the CZMA be made for OCS leasing decisions when it enacted the 1978 OCSLA Amendments.

In any event, the fact that additional licensing is required under the OCSLA scheme for exploration and development hardly makes those steps "indirect" consequences of leasing in the sense that any effect on the coastal zone is the result of intervening causes, which is the definition of "indirect" urged by petitioners.[33] Approval for exploration and development by the lessee is obviously the expected and intended result of leasing; if it were not, the Secretary would not bother to lease and the lessees would not bother to bid. Subsequent exploration and development is hardly an intervening cause; it is the natural and expected consequence of the original lease, and hence the "direct" effect of leasing. It would be disapproval of exploration and development that would constitute an intervening cause, not the expected approval.[34]

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[31] See also S. Rep. No. 95–284, pp. 43–44 (1977); S. Conf. Rep. No. 95–1091, p. 105 (1978).

[32] Regulations have been issued governing oil and gas leasing which implement this requirement by requiring consideration of state coastal zone management plans. See 43 CFR § 3310.4 (1982).

[33] The Court does not offer a definition of the term "directly" for purposes of § 307(c)(1) since it takes the position that the statute does not extend to OCS activities. Therefore, I address only petitioners' definition.

The 1980 Amendment to CZMA

In 1980, the CZMA was reauthorized and again amended. 94 Stat. 2060. In the course of considering the statute, Congress once again addressed the precise problem we are faced with today. Once again its answer was the same—OCS oil and gas leasing is subject to the consistency obligation of § 307(c)(1) of the CZMA. The House Report, for example, observed that the 1976 amendments had not altered this obligation. "The change did not alter Federal agency responsibility to provide States with a consistency determination related to OCS decisions which preceded issuance of leases." H. R. Rep. No. 96-1012, p. 28 (1980). The Report then went on to consider whether § 307 needed to be amended, and declined to do so only after determining that it clearly applied to OCS leasing.

> "Finally, the committee has not recommended any changes in the Federal consistency provision, section 307 of the existing act. During its oversight phase, the

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[34] Moreover, petitioners argue only that any "physical" impacts on the coastal zone depend on future licensing and hence are indirect. Petitioners cannot address the economic or social impacts of the leasing decision, however, which are not dependent upon subsequent approval, and which may well result in direct effects on the coastal zone, as Congress recognized both in the 1971 Senate Report and the 1976 CZMA amendments. As noted above, the findings of fact made by the lower courts indicate that the proposed lease sale at issue here would have had direct economic and social effects on the coastal zone.

> committee heard much testimony on these provisions. However, the consensus of witnesses advocated no change. . . .
>
> ". . . Generally all consistency provisions have been properly construed. The only uncertainty that has arisen concerns the interpretation of section 307(c)(1), the threshold test of 'directly affecting' the coastal zone. The committee points out that in the preamble to NOAA's Federal consistency regulations, this threshold test was considered during earlier congressional deliberations and was determined to apply whenever a Federal activity had a functional interrelationship from an economic, geographic or social standpoint with a State coastal program's land or water use policies. Under such circumstances, a State has a legitimate interest in reviewing a proposed Federal activity since the management program's policies are likely to apply to the activity. Thus, when a Federal Agency initiates a series of events of coastal management consequence, the intergovernmental coordination provisions of the Federal consistency requirements should apply." *Id.*, at 34.

Similarly, the Senate Report described the 1976 amendments as having maintained the consistency obligation for OCS leasing:

> "The Department of Interior's activities which preceded OCS lease sales were to remain subject to the requirements of section 307(c)(1) [under the 1976 CZMA]. As a result, intergovernmental coordination for purposes of OCS development commences at the earliest practicable time in the opinion of the Committee, as the Department of the Interior sets in motion a series of events which have consequences in the coastal zone. Coordination must continue during the critical exploration, development, and production stages.
>
> "The Committee see[s] no justification to depart from this point of view. The Committee hopes that through

> the rulemaking, future areas of disagreement over the application of Federal consistency will be substantially reduced, especially given the excellent record of application shown by the coastal States." S. Rep. No. 96–783, p. 11 (1980).[35]

Thus, the 1980 legislative history indicates that when Congress reauthorized the CZMA it intended § 307(c)(1) to be applied to OCS leasing decisions. Congress unmistakably rejected the position embraced by the majority today.[36]

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[35] To make sure of the correct construction of the Act, two sponsors of the 1980 amendments conducted a colloquy on the floor of the House in which they indicated that the intent of Congress was to apply § 307(c)(1) to OCS leasing decisions if as a factual matter they affected the coastal zone.

"[Mr. McCLOSKEY.] Do any portions of the Coastal Zone Management Improvement Act or the report language change the provisions of section 307 of the Coastal Zone Management Act on coordination and cooperation, the so-called Federal consistency provision?

"Mr. STUDDS. I would like to assure my colleague that nothing in H. R. 6979 nor its accompanying report changes the intent of the Federal consistency provision. In testimony before the Subcommittee on Oceanography, we heard from many witnesses that this section is critical for the effective implementation of State management programs. Since the consistency provisions are important to the act and appear to be working, no changes were made to section 307 of the act.

"Mr. McCLOSKEY. I assume that this means also that there are no changes in the bill or the report language which further modify the term 'directly affecting' which occurs in section 307(c)(1) of the original statute.

"Mr. STUDDS. The gentleman from Washington is correct. The term 'directly affecting is essentially one of fact' as the Department of Justice has previously concluded." 126 Cong. Rec. 28458 (1980).

Representative Studds' reference was to the Department of Justice's previously stated position that § 307(c)(1) did apply to OCS leasing activity if, in fact, a given leasing decision could be said to directly affect the coastal zone. See App. 35–47.

[36] Even if the Court were correct to view the 1980 history as not part of the legislative history of the CZMA, despite the fact that Congress in fact reauthorized the CZMA in 1980 and explicitly stated its view as to the correct construction of § 307(c)(1), this nevertheless qualifies as the view of a subsequent Congress and is not without persuasive value. See, *e. g., Bell* v. *New Jersey*, 461 U. S. 773, 784–785 (1983); *Bob Jones Univ.* v. *United States*, 461 U. S. 574, 599–602 (1983); *Andrus* v. *Shell Oil Co.*, 446 U. S. 657, 666, n. 8 (1980).

Postscript in 1981

After the new administration took office in 1981, the Secretary of Commerce proposed a CZMA regulation which would have removed OCS leasing decisions from the scope of consistency review.[37] The House Committee on Merchant Marine and Fisheries promptly considered whether to exercise a legislative veto over the regulations[38] and overwhelmingly voted to veto the regulations. H. R. Rep. No. 97–269, pp. 7–8 (1981). The regulations were later withdrawn, in an apparent administrative concession of error. 47 Fed. Reg. 4231 (1982). Apparently this is the last of a long series of congressional actions indicating that body's intent that OCS leasing be subject to consistency review under § 307(c)(1) of the CZMA.

In sum, the intent of Congress expressed in the plain language of the statute and in its long legislative history unambiguously requires consistency review if an OCS lease sale directly affects the coastal zone. The affirmative findings of fact made by the lower courts on that score are amply supported and are not disturbed by the Court today.

I therefore respectfully dissent.

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[37] See 46 Fed. Reg. 26660 (1981).

[38] See 16 U. S. C. § 1463a (1982 ed.).

WOODARD, SECRETARY OF CORRECTIONS OF NORTH CAROLINA, ET AL. *v.* HUTCHINS

ON APPLICATION TO VACATE STAY

No. A-557. Decided January 13, 1984

Held: An application to vacate an order of a Circuit Judge of the United States Court of Appeals for the Fourth Circuit staying respondent's execution is granted.

Application to vacate stay granted.

PER CURIAM.

This matter comes to the Court on the application of the State of North Carolina to vacate an order of a single Circuit Judge of the United States Court of Appeals for the Fourth Circuit, granting, at 12:05 a. m. today, respondent's application for a stay of execution. Circuit Judge Phillips had jurisdiction to consider respondent's application pursuant to 28 U. S. C. § 1651; accordingly, this Court has jurisdiction to consider the State's application. A transcript of Judge Phillips' opinion is before the Court. The application to vacate the stay of execution entered today, January 13, 1984, by Circuit Judge Phillips, was presented to the Chief Justice and by him referred to the Court.

The application to vacate said stay is granted.

It is so ordered.

JUSTICE POWELL, joined by THE CHIEF JUSTICE and JUSTICE BLACKMUN, JUSTICE REHNQUIST, and JUSTICE O'CONNOR, concurring.

Unlike JUSTICES WHITE and STEVENS, I do not believe that under the circumstances of this case the District Court was obligated to rule on this successive petition for writ of habeas corpus.

This is another capital case in which a last-minute application for a stay of execution and a new petition for habeas corpus relief have been filed with no explanation as to why the claims were not raised earlier or why they were not all raised in one petition. It is another example of abuse of the writ.[1]

On September 21, 1979, a jury convicted James Hutchins of two counts of first-degree murder and one count of murder in the second degree. He was sentenced to death. It is not denied that he deliberately murdered three policemen. After exhausting his state remedies, on September 24, 1982, Hutchins filed his first petition for federal habeas corpus in the United States District Court for the Western District of North Carolina. This was denied after an evidentiary hearing, and the United States Court of Appeals for the Fourth Circuit affirmed in a full opinion. *Hutchins* v. *Garrison*, 724 F. 2d 1425 (1983). On January 4, 1984, Hutchins filed a petition for certiorari with this Court seeking review of that decision.

Hutchins raised three claims in this habeas petition: (i) that his Sixth Amendment right to effective assistance of counsel had been denied because of a breakdown in communications with his court-appointed counsel; (ii) that the state trial court abused its discretion in denying defense counsel's motion for a continuance; and (iii) that imposition of the death penalty in his case was unconstitutional because the Eighth Amendment prohibits capital punishment of a person who is "mentally or emotionally distressed" at the time of the crime. This Court, after careful consideration, denied certiorari on January 11, 1984. *Post*, p. 1065. That same day Hutchins began anew his quest for postconviction relief, raising claims previously not raised.

After both the North Carolina trial court and the North Carolina Supreme Court denied Hutchins' new claims for postconviction relief, he filed a second petition in District

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[1] It would have been preferable had the District Court stated expressly that it would not entertain this successive petition because it constituted an abuse of the writ. Nevertheless, it is clear that the petition in this case was an abuse.

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Court on January 12, 1984.[2] This raised three new claims: that he had new evidence of his alleged insanity at the time of the crime; that he had evidence that he currently is insane; and that the jury selection process was unconstitutional. Hutchins offers no explanation for having failed to raise these claims in his first petition for habeas corpus, and I see none. Successive petitions for habeas corpus that raise claims deliberately withheld from prior petitions constitute an abuse of the writ.[3]

Title 28 U. S. C. § 2244 makes clear the power of the federal courts to eliminate the unnecessary burden placed on them by successive habeas applications by state prisoners. It provides:

> "(b) When after an evidentiary hearing on the merits . . . [a federal court or federal judge has denied a petition for federal habeas corpus], a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States . . . unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ."

See also 28 U. S. C. § 2254 Rule 9(b).

This case is a clear example of the abuse of the writ that § 2244(b) was intended to eliminate. All three of Hutchins' claims could and should have been raised in his first petition for federal habeas corpus. The new evidence that Hutchins offers to support his claim that he was insane at the time of the crime is the report of a forensic psychiatrist prepared after a January 2, 1984, psychiatric examination. Hutchins, convicted some four years ago, and frequently before courts during the intervening years, does not explain why this examination was not conducted earlier.[4] He does not claim that his alleged insanity is a recent development. In light of his claim that he also was insane at the time of the crime, such an assertion would be implausible. Finally, Hutchins does not explain why he failed to include his challenge to the jury selection in his prior habeas petition.

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[2] See the *per curiam* opinion of this Court, *ante*, p. 377, vacating the stay entered by Judge Phillips for the procedural posture of the case here.

[3] There is no affirmative evidence that the claims were deliberately withheld. But Hutchins has had counsel through the various phases of this case, and no explanation has been made as to why they were not raised until the very eve of the execution date.

A pattern seems to be developing in capital cases of multiple review in which claims that could have been presented years ago are brought forward—often in a piecemeal fashion—only after the execution date is set or becomes imminent. Federal courts should not continue to tolerate—even in capital cases—this type of abuse of the writ of habeas corpus.

JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, concurring.

Unlike our Brothers WHITE and STEVENS, we believe that the District Court is not obligated to rule on every 11th-hour petition for habeas corpus before it denies a stay. But assuming that the merits of the *Witherspoon* aspect of Judge Phillips' order granting the stay are necessarily before us, we find that nothing in the material presented by respondent would show that the particular jurors who sat in his case were "less than neutral with respect to *guilt*." *Witherspoon* v. *Illinois*, 391 U. S. 510, 520, n. 18 (1968). Absent such a showing, there can be no claim that respondent was denied this aspect of his right to a fair and impartial jury under the Sixth and Fourteenth Amendments, or that he would be subject to cruel and unusual punishment under the Eighth and Fourteenth Amendments.

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[4] Hutchins' case has been reviewed by at least seven courts, including this Court, and more than 25 judges.

JUSTICE BRENNAN, dissenting.

I find the Court's decision to vacate the stay of execution in this case simply incomprehensible. The stay was granted early this morning, at 12:05, by Judge James Dickson Phillips of the United States Court of Appeals for the Fourth Circuit. Judge Phillips correctly decided that a stay was necessary in order to preserve a substantial issue raised by the condemned prisoner, James Hutchins. That issue—whether the exclusion for cause of potential jurors unequivocally opposed to the death penalty resulted in a biased jury during the guilt phase of the trial proceedings against Hutchins—is currently the subject of a conflict between judges of the District Court for the Western District of North Carolina and remains undecided by this Court.

As the Court recognizes, Judge Phillips had jurisdiction over this case.* Late yesterday, Hutchins filed a petition for a writ of habeas corpus and an application for a stay of execution in the court of District Judge Woodrow W. Jones. Chief Judge Jones, however, acted only to deny the application, leaving in limbo Hutchins' petition for habeas corpus. After taking this action, Chief Judge Jones apparently went home. As a result, when Hutchins approached Judge Phillips for relief, Judge Phillips was faced with an application to stay the execution scheduled to take place within a matter of hours, appended to which was a copy of Hutchins' petition for habeas corpus that had been left undecided by the District Court.

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*As JUSTICE MARSHALL points out, the Court's zealous efforts to reimpose Hutchins' execution at the last minute may therefore be futile. North Carolina's death penalty statute requires that a new date of execution be set once a stay of execution, *issued by a court of competent jurisdiction*, is terminated. N. C. Gen. Stat. § 15–194 (1983). As we have noted, the Court holds that Judge Phillips had jurisdiction to issue his stay. It thus appears that the North Carolina statute is applicable and will require that Hutchins' execution be postponed.

Judge Phillips, knowing that a petition for a writ of habeas corpus was then pending in the District Court, and would not be decided before Hutchins' execution, correctly issued the stay to preserve the issue noted above. As JUSTICE WHITE and JUSTICE STEVENS note, the stay was properly issued to allow the District Court to act on the habeas petition. In addition, under 28 U. S. C. § 2241, it was appropriate for Judge Phillips to treat the papers filed with him as an independent petition for a writ of habeas corpus, refer that petition to the District Court, and grant a stay under 28 U. S. C. § 2251 pending decision by the District Court. See also All Writs Act, 28 U. S. C. § 1651.

Despite its holding that Judge Phillips had jurisdiction to issue the stay, the Court has inexplicably concluded that Judge Phillips improperly exercised that jurisdiction. A stay issued by a lower court, however, should be vacated only upon a showing that issuance of the stay was an abuse of discretion. Far from being an abuse of discretion, the action of Judge Phillips was eminently reasonable and correct. Not only is there at least one other federal judge in Judge Phillips' own Circuit who has ruled favorably on the merits of this question, see *Keeten* v. *Garrison*, 578 F. Supp. 1164 (WDNC 1984), and at least one District Court in Arkansas that has reached a similar conclusion, see *Grigsby* v. *Mabry*, 569 F. Supp. 1273 (ED Ark. 1983), appeal pending, No. 83–2113 (CA8, filed Aug. 8, 1983), but also this Court itself has recognized the potential validity of the claim. See, *e. g.*, *Witherspoon* v. *Illinois*, 391 U. S. 510, 516–518 (1968); *Bumper* v. *North Carolina*, 391 U. S. 543, 545, and nn. 5, 6 (1968). See also Winick, Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis, 81 Mich. L. Rev. 1 (1982).

Finally, the State argues that Hutchins should pursue state-court remedies in light of yesterday's *Keeten* decision. While this obviously is not the basis of the Court's vacation of the stay, this in any event is a literal impossibility given the 6 p. m.

deadline for execution. Indeed, in light of the constraints imposed on our deliberations by that deadline, the most disturbing aspect of the Court's decision is its indefensible—and unexplained—rush to judgment. When a life is at stake, the process that produces this result is surely insensitive, if not ghoulish.

I dissent.

JUSTICE WHITE and JUSTICE STEVENS, dissenting.

We would not vacate the stay because the District Court did not pass on the merits of the habeas corpus petition and the stay was entered by a Court of Appeals Judge until the District Court performs its duty and acts on the habeas petition. Until the merits of the petition are addressed below or it is there held that there has been abuse of the writ, we would leave the stay in effect. That is the orderly procedure it seems to us. It also seems to us that the Court's opaque *per curiam* opinion vacating the stay comes very close to a holding that a second petition for habeas corpus should be considered as an abuse of the writ and for that reason need not be otherwise addressed on the merits. We are not now prepared to accept such a *per se* rule.

JUSTICE MARSHALL, dissenting.

At 12:05 a. m. today, Judge James Dickson Phillips of the United States Court of Appeals for the Fourth Circuit granted respondent Hutchins' application for a stay of execution. Less than an hour after the stay was issued, attorneys from the North Carolina Attorney General's Office filed in this Court a 3½-page, handwritten application to vacate Judge Phillips' stay. Without taking time to consider the basis of Judge Phillips' stay—indeed without waiting to receive the final draft of Judge Phillips' memorandum opinion—the Court has granted the application, apparently so that North Carolina can proceed with Hutchins' execution before his death warrant expires at 6 o'clock this evening. Given the posture of this application and the dire consequences of error, I find the Court's haste outrageous.

Without any explanation, the Court takes the position that Judge Phillips somehow erred in granting a stay of Hutchins' execution.[1] As JUSTICE BRENNAN has shown, *ante*, at 382, Judge Phillips' decision to grant the stay was a prudent exercise of authority taken by a federal judge under serious time constraints and dealing with considerable uncertainty. What is incredible about this Court's decision is that five Members of the Court have voted to vacate Judge Phillips' stay without even reading his opinion[2] or fully considering respondent's defense of the stay. Indeed, at the present time, the Court does not even have before it a full record of the case.[3] In all candor, if there is abuse of federal power in this matter, it is to be found in our own Chambers.

Ironically, the Court's zealous efforts to authorize Hutchins' execution at the last minute may be futile. The North Carolina death penalty statute apparently requires that a new date of execution must be set whenever a stay of execution is issued and then vacated.[4] N. C. Gen. Stat. § 15–194

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[1] Much of the State's application involves a challenge to Judge Phillips' jurisdiction and an argument that Hutchins is procedurally barred from raising his juror-bias claim in federal court. The majority apparently agrees with respondent that these threshold claims are insubstantial.

[2] Early this morning, the Court received over the telephone a short summary of Judge Phillips' decision, which the Clerk's Office transcribed. That brief, preliminary draft concluded with the statement, "I will say roughly the foregoing in a very short memorandum opinion that I will file tomorrow."

[3] In addition to the State's handwritten application, the Court has received over the course of the day Hutchins' response to the State's application and supplemental handwritten papers from both parties. Although respondent has filed various briefs that he presented to other courts in this litigation, neither party has filed a complete transcript of the trial court *voir dire*, at which the deprivation of Hutchins' constitutional rights allegedly took place.

[4] The relevant statute reads: "Whenever . . . a stay of execution granted by any competent judicial tribunal . . . has expired or been terminated, . . . *a hearing shall be held* in a superior court . . . to fix a new date for the

(1983). Since Judge Phillips indisputably issued a stay of execution and the Court now vacates the stay, North Carolina law would seem to require that a new date of execution now be set.[5] Of course, the meaning of this provision is a question of North Carolina law, and is therefore to be decided by North Carolina courts. I trust, however, that the responsible North Carolina officials will consider whether Hutchins has a valid claim under this provision before the State proceeds with Hutchins' execution.

I dissent.

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execution of the original sentence. . . . The judge shall set the date of execution for not less than 60 days nor more than 90 days from the date of the hearing." N. C. Gen. Stat. § 15-194 (1983) (emphasis added). The majority's *per curiam* clearly concludes that Judge Phillips was a competent judicial tribunal with jurisdiction to issue a stay. See n. 1, *supra*.

[5] Common decency demands such a postponement, especially since, under North Carolina law, Hutchins must already have been notified of his reprieve by Judge Phillips. See N. C. Gen. Stat. § 15-193 (1983).

BADARACCO ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 82–1453. Argued November 28, 1983—Decided January 17, 1984*

Section 6501(a) of the Internal Revenue Code of 1954 establishes a general 3-year period of limitations "after the return was filed" for the assessment of federal income taxes. However, § 6501(c)(1) provides that when there is "a false or fraudulent return with the intent to evade tax," the tax then may be assessed "at any time." In No. 82–1453, petitioners conceded, for purposes of this litigation, that they had filed fraudulent partnership and individual income tax returns for the years 1965–1969. However, in 1971 they filed nonfraudulent amended returns and paid the additional basic taxes shown thereon. In 1977, the Commissioner of Internal Revenue issued notices of deficiency, asserting liability under § 6653(b) of the Code for the addition to tax on account of fraud of 50% of the underpayment in the basic tax. Petitioners sought redetermination in the United States Tax Court of the asserted deficiencies, contending that § 6501(c)(1) did not apply because of the filing of the nonfraudulent amended returns, and that the Commissioner's action was barred by § 6501(a) because the deficiency notices were issued more than three years from the date of filing of the amended returns. The Tax Court agreed with petitioners. In No. 82–1509, petitioner filed timely corporation income tax returns for the years 1967 and 1968, but in 1973 it filed amended returns disclosing certain receipts that had not been reported on the original returns. In 1979, the Commissioner issued a notice asserting deficiencies in tax and additions under § 6653(b) for 1967 and 1968. Petitioner paid the alleged deficiencies and brought suit for refund in Federal District Court, which granted summary judgment for petitioner on the ground that the Commissioner's action was barred by § 6501(a), regardless of whether the original returns were fraudulent. The Court of Appeals, consolidating the appeals, reversed in both cases.

Held: Where a taxpayer files a false or fraudulent return but later files a nonfraudulent amended return, § 6501(c)(1) applies and a tax may be assessed "at any time," regardless of whether more than three years have expired since the filing of the amended return. Pp. 391–401.

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*Together with No. 82–1509, *Deleet Merchandising Corp.* v. *United States*, also on certiorari to the same court.

(a) The plain and unambiguous language of § 6501(c)(1) permits the Commissioner to assess "at any time" the tax for a year in which the taxpayer has filed "a false or fraudulent return," despite any subsequent disclosure the taxpayer might make. Nothing is present in the statute that can be construed to suspend its operation as a consequence of a fraudulent filer's subsequent repentant conduct. Neither is there anything in the wording of § 6501(a) that itself enables a taxpayer to reinstate the section's general 3-year limitations period by filing an amended return. Moreover, the substantive operation of the fraud provisions of the Code itself confirms the conclusion that § 6501(c)(1) permits assessment at any time in fraud cases regardless of a taxpayer's later repentance. Pp. 391–396.

(b) Nothing in the statutory language, the structure of the Code, or the decided cases supports petitioners' contention that a fraudulent return is a "nullity" for statute of limitations purposes and that therefore the amended return is necessarily "the return" referred to in § 6501(a). Pp. 396–397.

(c) There is no need to twist § 6501(c)(1) beyond the contours of its plain and unambiguous language in order to comport with good policy, for its literal language is supported by substantial policy considerations—the increased difficulty in investigating fraud cases as opposed to cases marked for routine audits; the fact that the filing of a document styled "amended return" does not fundamentally change the nature of a tax fraud investigation; and the compounding of the difficulties that attend a civil fraud investigation where the Commissioner's initial findings lead him to conclude that the case should be referred to the Department of Justice for criminal prosecution. Pp. 397–400.

(d) Petitioners' argument that a literal reading of § 6501(c) would elevate one form of tax fraud over another because it produces a disparity in treatment between a taxpayer who in the first instance files a fraudulent return and one who fraudulently fails to file any return at all, cannot prevail. Section 6501(c)(3)—which provides that in a case of failure to file a return, the tax may be assessed "at any time"—has been construed as ceasing to apply once a return has been filed for a particular year, regardless of whether that return is filed late and even though the failure to file a timely return in the first instance was due to fraud. However, the language employed in the respective subsections of § 6501 establishes that Congress intended different limitations results under § 6501(c)(1). Pp. 400–401.

693 F. 2d 298, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, POWELL, REHNQUIST, and

O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 401.

Barry I. Fredericks argued the cause for petitioners in both cases and filed briefs for petitioner in No. 82–1509. *John J. O'Toole* and *Edwin Fradkin* filed a brief for petitioners in No. 82–1453.

Albert G. Lauber, Jr., argued the cause for respondents in both cases. With him on the brief were *Solicitor General Lee, Assistant Attorney General Archer, Gary R. Allen*, and *John A. Dudeck, Jr.*

JUSTICE BLACKMUN delivered the opinion of the Court.

These cases focus upon § 6501 of the Internal Revenue Code of 1954, 26 U. S. C. § 6501. Subsection (a) of that statute establishes a general 3-year period of limitations "after the return was filed" for the assessment of income and certain other federal taxes.[1] Subsection (c)(1) of § 6501, however, provides an exception to the 3-year period when there is "a false or fraudulent return with the intent to evade tax." The tax then may be assessed "at any time."[2]

The issue before us is the proper application of §§ 6501(a) and (c)(1) to the situation where a taxpayer files a false or fraudulent return but later files a nonfraudulent amended return. May a tax then be assessed more than three years after the filing of the amended return?

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[1] Section 6501(a) reads in full:

"Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period."

[2] Section 6501(c)(1) reads:

"In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time."

I

No. 82-1453. Petitioners Ernest Badaracco, Sr., and Ernest Badaracco, Jr., were partners in an electrical contracting business. They filed federal partnership and individual income tax returns for the calendar years 1965–1969, inclusive. "[F]or purposes of this case," these petitioners concede the "fraudulent nature of the original returns." App. 37a.

In 1970 and 1971, federal grand juries in New Jersey subpoenaed books and records of the partnership. On August 17, 1971, petitioners filed nonfraudulent amended returns for the tax years in question and paid the additional basic taxes shown thereon. Three months later, petitioners were indicted for filing false and fraudulent returns, in violation of § 7206(1) of the Code, 26 U. S. C. § 7206(1). Each pleaded guilty to the charge with respect to the 1967 returns, and judgments of conviction were entered. *United States* v. *Badaracco*, Crim. No. 766–71 (NJ). The remaining counts of the indictment were dismissed.

On November 21, 1977, the Commissioner of Internal Revenue mailed to petitioners notices of deficiency for each of the tax years in question. He asserted, however, only the liability under § 6653(b) of the Code, 26 U. S. C. § 6653(b), for the addition to tax on account of fraud (the so-called fraud "penalty") of 50% of the underpayment in the basic tax. See App. 5a.

Petitioners sought redetermination in the United States Tax Court of the asserted deficiencies, contending that the Commissioner's action was barred by § 6501(a). They claimed that § 6501(c)(1) did not apply because the 1971 filing of nonfraudulent amended returns caused the general 3-year period of limitations specified in § 6501(a) to operate; the deficiency notices, having issued in November 1977, obviously were forthcoming only long after the expiration of three years from the date of filing of the nonfraudulent amended returns.

The Tax Court, in line with its then-recent decision in *Klemp* v. *Commissioner*, 77 T. C. 201 (1981), appeal pending, No. 81–7744 (CA9), agreed with petitioners.[3] 42 TCM 573 (1981), ¶81, 404 P-H Memo TC.

No. 82–1509. Petitioner Deleet Merchandising Corp. filed timely corporation income tax returns for the calendar years 1967 and 1968. The returns as so filed, however, did not report certain receipts derived by the taxpayer from its printing supply business. On August 9, 1973, Deleet filed amended returns for 1967 and 1968 disclosing the receipts that had not been reported.[4] Although the taxpayer corporation itself was not charged with criminal tax violations, and although no formal criminal investigation was initiated as to it, there were criminal and civil investigations that centered on certain former officers of the taxpayer. After the completion of those investigations, the Commissioner, on December 14, 1979, issued a notice of deficiency to Deleet. App. 71a. The notice asserted deficiencies in tax and additions under § 6653(b) for 1967 and 1968.

Deleet paid the alleged deficiencies and brought suit for their refund in the United States District Court for the District of New Jersey. On its motion for summary judgment, Deleet contended that the Commissioner's action was barred by § 6501(a). It claimed that no deficiencies or additions could be assessed more than three years after the amended returns were filed, regardless of whether the original returns were fraudulent.

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[3] In *Klemp*, the Tax Court, in a reviewed decision with five judges dissenting on the issue, departed from its earlier holding in *Dowell* v. *Commissioner*, 68 T. C. 646 (1977), rev'd, 614 F. 2d 1263 (CA10 1980), cert. pending, No. 82–1873.

[4] Deleet asserts that the filing of its amended returns was voluntary. The taxpayer's correct tax liability has not yet been determined. Although Deleet has not conceded that its original returns were fraudulent, both the District Court, App. to Pet. for Cert. in No. 82–1509, p. 4d, and the Court of Appeals, see 693 F. 2d 298, 299, n. 3 (CA3 1982), assumed, for purposes of Deleet's summary judgment motion hereinafter referred to, that they were. We must make the same assumption here.

The District Court agreed and granted summary judgment for Deleet. 535 F. Supp. 402 (1981). It relied on the Tax Court's decision in *Klemp* v. *Commissioner, supra,* and on *Dowell* v. *Commissioner,* 614 F. 2d 1263 (CA10 1980), cert. pending, No. 82–1873.

The Appeals. The Government appealed each case to the United States Court of Appeals for the Third Circuit. The cases were heard and decided together. That court, by a 2-to-1 vote, reversed the decision of the Tax Court in *Badaracco* and the judgment of the District Court in *Deleet.* 693 F. 2d 298 (1982). The Third Circuit's ruling is consistent with the Fifth Circuit's holding in *Nesmith* v. *Commissioner,* 699 F. 2d 712 (1983), cert. pending, No. 82–2008. The Second Circuit has ruled otherwise. See *Britton* v. *United States,* 532 F. Supp. 275 (Vt. 1981), affirmance order, 697 F. 2d 288 (CA2 1982). See also *Espinoza* v. *Commissioner,* 78 T. C. 412 (1982).[5] Because of the conflict, we granted certiorari, 461 U. S. 925 (1983).

II

Our task here is to determine the proper construction of the statute of limitations Congress has written for tax assessments. This Court long ago pronounced the standard: "Statutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of the Government." *E. I. du Pont de Nemours & Co.* v. *Davis,* 264 U. S. 456, 462 (1924). See also *Lucas* v. *Pilliod*

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[5] The Tax Court, in cases concerning several of Deleet's officers, has followed its ruling in *Klemp, supra.* See *Kramer* v. *Commissioner,* 44 TCM 42 (1982), ¶82, 308 P-H Memo TC; *Elliott Liroff* v. *Commissioner,* 44 TCM 43 (1982), ¶82, 309 P-H Memo TC; *Derfel* v. *Commissioner,* 44 TCM 45 (1982), ¶82, 311 P-H Memo TC; *Richard B. Liroff* v. *Commissioner,* 44 TCM 47 (1982), ¶82, 312 P-H Memo TC. See also *Galvin* v. *Commissioner,* 45 TCM 221 (1982), ¶82, 689 P-H Memo TC.

Lumber Co., 281 U. S. 245, 249 (1930). More recently, Judge Roney, in speaking for the former Fifth Circuit, has observed that "limitations statutes barring the collection of taxes otherwise due and unpaid are strictly construed in favor of the Government." *Lucia* v. *United States*, 474 F. 2d 565, 570 (1973).

We naturally turn first to the language of the statute. Section 6501(a) sets forth the general rule: a 3-year period of limitations on the assessment of tax. Section 6501(e)(1)(A) (first introduced as § 275(c) of the Revenue Act of 1934, 48 Stat. 745) provides an extended limitations period for the situation where the taxpayer's return nonfraudulently omits more than 25% of his gross income; in a situation of that kind, assessment now is permitted "at any time within 6 years after the return was filed."

Both the 3-year rule and the 6-year rule, however, explicitly are made inapplicable in circumstances covered by § 6501(c). This subsection identifies three situations in which the Commissioner is allowed an unlimited period within which to assess tax. Subsection (c)(1) relates to "a false or fraudulent return with the intent to evade tax" and provides that the tax then may be assessed "at any time." Subsection (c)(3) covers the case of a failure to file a return at all (whether or not due to fraud) and provides that an assessment then also may be made "at any time." Subsection (c)(2) sets forth a similar rule for the case of a "willful attempt in any manner to defeat or evade tax" other than income, estate, and gift taxes.[6]

All these provisions appear to be unambiguous on their face, and it therefore would seem to follow that the present cases are squarely controlled by the clear language of § 6501(c)(1). Petitioners Badaracco concede that they filed initial returns that were "false or fraudulent with the intent to evade tax." Petitioner Deleet, for present purposes, upon this review of its motion for summary judgment, is deemed to have filed false or fraudulent returns with the intent to evade tax. Section 6501(c)(1), with its unqualified language, then allows the tax to be assessed "at any time." Nothing is present in the statute that can be construed to suspend its operation in the light of a fraudulent filer's subsequent repentant conduct.[7] Neither is there anything in the wording of § 6501(a) that itself enables a taxpayer to reinstate the section's general 3-year limitations period by filing an amended return. Indeed, as this Court recently has noted, *Hillsboro National Bank* v. *Commissioner*, 460 U. S. 370, 378–380, n. 10 (1983), the Internal Revenue Code does not explicitly provide either for a taxpayer's filing, or for the Commissioner's acceptance, of an amended return; instead, an amended return is a creature of administrative origin and grace. Thus, when Congress provided for assessment at any time in the case of a false or fraudulent "return," it plainly included by this language a false or fraudulent *original* return. In this connection, we note that until the decision of the Tenth Circuit in *Dowell* v. *Commissioner*, 614 F. 2d 1263 (1980), cert. pending, No. 82–1873, courts consistently had held that the operation of § 6501 and its predecessors turned on the nature of the taxpayer's original, and not his amended, return.[8]

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[6] Subsections (c)(1) and (c)(3) appeared separately only upon the enactment of the 1954 Code. From 1921 until the 1954 Code, they were combined. See, *e. g.*, Revenue Act of 1921, § 250(d), 42 Stat. 265; Internal Revenue Code of 1939, § 276(a).

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[7] Under every general income tax statute since 1918, the filing of a false or fraudulent return has indefinitely extended the period of limitations for assessment of tax. See Revenue Act of 1918, § 250(d), 40 Stat. 1083; Revenue Act of 1921, § 250(d), 42 Stat. 265; Revenue Act of 1924, § 278(a), 43 Stat. 299; Revenue Act of 1926, § 278(a), 44 Stat., pt. 2, p. 59; Revenue Act of 1928, § 276(a), 45 Stat. 857; Revenue Act of 1932, § 276(a), 47 Stat. 238; Revenue Act of 1934, § 276(a), 48 Stat. 745; Revenue Act of 1936, § 276(a), 49 Stat. 1726; Revenue Act of 1938, § 276(a), 52 Stat. 540; Internal Revenue Code of 1939, § 276(a).

[8] The significance of the original, and not the amended, return has been stressed in other, but related, contexts. It thus has been held consistently that the filing of an amended return in a nonfraudulent situation does not

The substantive operation of the fraud provisions of the Code itself confirms the conclusion that § 6501(c)(1) permits assessment at any time in fraud cases regardless of a taxpayer's later repentance. It is established that a taxpayer who submits a fraudulent return does not purge the fraud by subsequent voluntary disclosure; the fraud was committed, and the offense completed, when the original return was prepared and filed. See, *e. g.*, *United States* v. *Habig*, 390 U. S. 222 (1968); *Plunkett* v. *Commissioner*, 465 F. 2d 299, 302–303 (CA7 1972). "Any other result would make sport of the so-called fraud penalty. A taxpayer who had filed a fraudulent return would merely take his chances that the fraud would not be investigated or discovered, and then, if an investigation were made, would simply pay the tax which he owed anyhow and thereby nullify the fraud penalty." *George M. Still, Inc.* v. *Commissioner*, 19 T. C. 1072, 1077 (1953), aff'd, 218 F. 2d 639 (CA2 1955). In short, once a fraudulent return has been filed, the case remains one "of a false or fraudulent return," regardless of the taxpayer's later revised conduct, for purposes of criminal prosecution and civil fraud liability under § 6653(b). It likewise should remain such a case for purposes of the unlimited assessment period specified by § 6501(c)(1).

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serve to extend the period within which the Commissioner may assess a deficiency. See, *e. g.*, *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172 (1934); *National Paper Products Co.* v. *Helvering*, 293 U. S. 183 (1934); *National Refining Co.* v. *Commissioner*, 1 B. T. A. 236 (1924). It also has been held that the filing of an amended return does not serve to reduce the period within which the Commissioner may assess taxes where the original return omitted enough income to trigger the operation of the extended limitations period provided by § 6501(e) or its predecessors. See, *e. g.*, *Houston* v. *Commissioner*, 38 T. C. 486 (1962); *Goldring* v. *Commissioner*, 20 T. C. 79 (1953). And the period of limitations for filing a refund claim under the predecessor of § 6511(a) begins to run on the filing of the original, not the amended, return. *Kaltreider Construction, Inc.* v. *United States*, 303 F. 2d 366, 368 (CA3), cert. denied, 371 U. S. 877 (1962).

We are not persuaded by Deleet's suggestion, Brief for Petitioner in No. 82–1509, p. 15, that § 6501(c)(1) should be read merely to suspend the commencement of the limitations period while the fraud remains uncorrected. The Tenth Circuit, in *Dowell* v. *Commissioner*, *supra*, made an observation to that effect, stating that the 3-year limitations period was "put in limbo" pending further taxpayer action. 614 F. 2d, at 1266. The language of the statute, however, is contrary to this suggestion. Section 6501(c)(1) does not "suspend" the operation of § 6501(a) until a fraudulent filer makes a voluntary disclosure. Section 6501(c)(1) makes no reference at all to § 6501(a); it simply provides that the tax may be assessed "at any time." And § 6501(a) itself contains no mechanism for its operation when a fraudulent filer repents. By its very terms, it does not apply to a case, such as one of "a false or fraudulent return," that is "otherwise provided" for in § 6501. When Congress intends only a temporary suspension of the running of a limitations period, it knows how unambiguously to accomplish that result. See, *e. g.*, §§ 6503(a)(1), (a)(2), (b), (c), and (d).

The weakness of petitioners' proposed statutory construction is demonstrated further by its impact on § 6501(e)(1)(A), which provides an extended limitations period whenever a taxpayer's return nonfraudulently omits more than 25% of his gross income.

Under petitioners' reasoning, a taxpayer who *fraudulently* omits 25% of his gross income gains the benefit of the 3-year limitations period by filing an amended return. Yet a taxpayer who *nonfraudulently* omits 25% of his gross income cannot gain that benefit by filing an amended return; instead, he must live with the 6-year period specified in § 6501(e)(1)(A).[9] We agree with the conclusion of the Court of Appeals in the instant cases that Congress could not have intended to "create a situation in which persons who committed willful, deliberate fraud would be in a better position" than those who understated their income inadvertently and without fraud. 693 F. 2d, at 302.

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[9] In both *Dowell* and *Klemp*, the Commissioner had issued his deficiency notices more than three years after the amended returns were filed but within the extended 6-year period after the original returns were

We therefore conclude that the plain and unambiguous language of § 6501(c)(1) would permit the Commissioner to assess "at any time" the tax for a year in which the taxpayer has filed "a false or fraudulent return," despite any subsequent disclosure the taxpayer might make. Petitioners attempt to evade the consequences of this language by arguing that their original returns were "nullities." Alternatively, they urge a nonliteral construction of the statute based on considerations of policy and practicality. We now turn successively to those proposals.

III

Petitioners argue that their original returns, to the extent they were fraudulent, were "nullities" for statute of limitations purposes. See Brief for Petitioners in No. 82–1453, pp. 22–27; Brief for Petitioner in No. 82–1509, pp. 32–34. Inasmuch as the original return is a nullity, it is said, the amended return is necessarily "the return" referred to in § 6501(a). And if that return is nonfraudulent, § 6501(c)(1) is inoperative and the normal 3-year limitations period applies. This nullity notion does not persuade us, for it is plain that "the return" referred to in § 6501(a) is the original, not the amended, return.

Petitioners do not contend that their fraudulent original returns were nullities for purposes of the Code generally. There are numerous provisions in the Code that relate to civil and criminal penalties for submitting or assisting in the preparation of false or fraudulent returns; their presence makes clear that a document which on its face plausibly purports to

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filed. The courts in those cases nonetheless ruled the notices untimely. That result flows necessarily from petitioners' proposed statutory construction. It seems to us, however, to be unacceptably anomalous.

be in compliance, and which is signed by the taxpayer, is a return despite its inaccuracies. See, *e. g.*, §§ 7207, 6531(3), 6653(b). Neither do petitioners contend that their original returns were nullities for all purposes of § 6501. They contend, instead, that a fraudulent return is a nullity only for the limited purpose of applying § 6501(a). See Brief for Petitioners in No. 82–1453, p. 24; Brief for Petitioner in No. 82–1509, pp. 33–34. The word "return," however, appears no less than 64 times in § 6501. Surely, Congress cannot rationally be thought to have given that word one meaning in § 6501(a), and a totally different meaning in §§ 6501(b) through (q).

Zellerbach Paper Co. v. *Helvering*, 293 U. S. 172 (1934), which petitioners cite, affords no support for their argument. The Court in *Zellerbach* held that an original return, despite its inaccuracy, was a "return" for limitations purposes, so that the filing of an amended return did not start a new period of limitations running. In the instant cases, the original returns similarly purported to be returns, were sworn to as such, and appeared on their faces to constitute endeavors to satisfy the law. Although those returns, in fact, were not honest, the holding in *Zellerbach* does not render them nullities. To be sure, current Regulations, in several places, *e. g.*, Treas. Reg. §§ 301.6211–1(a), 301.6402–3(a), 1.451–1(a), and 1.461–1(a)(3)(i) (1983), do refer to an amended return, as does § 6213(g)(1) of the Code itself, 26 U. S. C. § 6213(g)(1) (1976 ed., Supp. V). None of these provisions, however, requires the filing of such a return. It does not follow from all this that an amended return becomes "the return" for purposes of § 6501(a).

We conclude, therefore, that nothing in the statutory language, the structure of the Code, or the decided cases supports the contention that a fraudulent return is a nullity for statute of limitations purposes.

IV

Petitioners contend that a nonliteral reading should be accorded the statute on grounds of equity to the repentant taxpayer and tax policy. "Once a taxpayer has provided the information upon which the Government may make a knowledgeable assessment, the justification for suspending the limitations period is no longer viable and must yield to the favored policy of limiting the Government's time to proceed against the taxpayer." Brief for Petitioner in No. 82–1509, p. 12. See also Brief for Petitioners in No. 82–1453, p. 17.

The cases before us, however, concern the construction of existing statutes. The relevant question is not whether, as an abstract matter, the rule advocated by petitioners accords with good policy. The question we must consider is whether the policy petitioners favor is that which Congress effectuated by its enactment of § 6501. Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement. See *TVA* v. *Hill*, 437 U. S. 153, 194–195 (1978). This is especially so when courts construe a statute of limitations, which "must receive a strict construction in favor of the Government." *E. I. du Pont de Nemours & Co.* v. *Davis*, 264 U. S., at 462.

We conclude that, even were we free to do so, there is no need to twist § 6501(c)(1) beyond the contours of its plain and unambiguous language in order to comport with good policy, for substantial policy considerations support its literal language. First, fraud cases ordinarily are more difficult to investigate than cases marked for routine tax audits. Where fraud has been practiced, there is a distinct possibility that the taxpayer's underlying records will have been falsified or even destroyed. The filing of an amended return, then, may not diminish the amount of effort required to verify the correct tax liability. Even though the amended return proves to be an honest one, its filing does not necessarily "remov[e] the Commissioner from the disadvantageous position in which he was originally placed." Brief for Petitioners in No. 82–1453, p. 12.

Second, the filing of a document styled "amended return" does not fundamentally change the nature of a tax fraud investigation. An amended return, however accurate it ultimately may prove to be, comes with no greater guarantee of trustworthiness than any other submission. It comes carrying no special or significant imprimatur; instead, it comes from a taxpayer who already has made false statements under penalty of perjury. A responsible examiner cannot accept the information furnished on an amended return as a substitute for a thorough investigation into the existence of fraud. We see no "tax policy" justification for holding that an amended return has the singular effect of shortening the unlimited assessment period specified in §§6501(c)(1) to the usual three years. Fraud cases differ from other civil tax cases in that it is the Commissioner who has the burden of proof on the issue of fraud. See §7454(a) of the Code, 26 U. S. C. §7454(a). An amended return, of course, may constitute an admission of substantial underpayment, but it will not ordinarily constitute an admission of fraud. And the three years may not be enough time for the Commissioner to prove fraudulent intent.

Third, the difficulties that attend a civil fraud investigation are compounded where, as in No. 82–1453, the Commissioner's initial findings lead him to conclude that the case should be referred to the Department of Justice for criminal prosecution. The period of limitations for prosecuting criminal tax fraud is generally six years. See §6531. Once a criminal referral has been made, the Commissioner is under well-known restraints on the civil side and often will find it difficult to complete his civil investigation within the normal 3-year period; the taxpayer's filing of an amended return will not make any difference in this respect. See *United States* v. *LaSalle National Bank*, 437 U. S. 298, 311–313 (1978); see also Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97–248, §333(a), 96 Stat. 622. As a practical matter, therefore, the Commissioner frequently is forced to place a civil audit in abeyance when a criminal prosecution is recommended.[10]

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[10] Petitioners contend that these policy considerations favorable to the Commissioner do not apply on the facts of petitioners' cases. Brief for

We do not find petitioners' complaint of "unfair treatment" persuasive. Petitioners claim that it is unfair "to forever suspend a Sword of Damocles over a taxpayer who at one time may have filed a fraudulent return, but who has subsequently recanted and filed an amended return providing the Government with all the information necessary to properly assess the tax." Brief for Petitioner in No. 82-1509, p. 26. See Brief for Petitioners in No. 82-1453, p. 16. But it seems to us that a taxpayer who has filed a fraudulent return with intent to evade tax hardly is in a position to complain of the fairness of a rule that facilitates the Commissioner's collection of the tax due. A taxpayer who has been the subject of a tax fraud investigation is not likely to be surprised when a notice of deficiency arrives, even if it does not arrive promptly after he files an amended return.

Neither are we persuaded by Deleet's argument that a literal reading of the statute "punishes" the taxpayer who repentantly files an amended return. See Brief for Petitioner in No. 82-1509, p. 44. The amended return does not change the status of the taxpayer; he is left in precisely the same position he was in before. It might be argued that Congress should provide incentives to taxpayers to disclose their fraud voluntarily. Congress, however, has not done so in § 6501. That legislative judgment is controlling here.

V

Petitioners contend, finally, that a literal reading of § 6501(c) produces a disparity in treatment between a taxpayer who in the first instance files a fraudulent return and one who fraudulently fails to file any return at all. This, it is said, would elevate one form of tax fraud over another.

Petitioners in No. 82-1453, pp. 33-34; Brief for Petitioner in No. 82-1509, pp. 35-36. This assertion is irrelevant, for the cases involve construction of a statute of limitations, not a question of laches, a defense to which the Government usually is not subject. See *United States* v. *Summerlin*, 310 U. S. 414, 416 (1940).

The argument centers in § 6501(c)(3), which provides that in a case of failure to file a return, the tax may be assessed "at any time." It is settled that this section ceases to apply once a return has been filed for a particular year, regardless of whether that return is filed late and even though the failure to file a timely return in the first instance was due to fraud. See *Bennett* v. *Commissioner*, 30 T. C. 114 (1958), acq., 1958-2 Cum. Bull. 3. See also Rev. Rul. 79-178, 1979-1 Cum. Bull. 435. This, however, does not mean that § 6501 should be read to produce the same result in each of the two situations. From the language employed in the respective subsections of § 6501, we conclude that Congress intended different limitations results. Section 6501(c)(3) applies to a "failure to file a return." It makes no reference to a failure to file a timely return (cf. §§ 6651(a)(1) and 7203), nor does it speak of a fraudulent failure to file. The section literally becomes inapplicable once a return has been filed. Section 6501(c)(1), in contrast, applies in the case of "a false or fraudulent return." The fact that a fraudulent filer subsequently submits an amended return does not make the case any less one of a false or fraudulent return. Thus, although there may be some initial superficial plausibility to this argument on the part of petitioners, we conclude that the argument cannot prevail. If the result contended for by petitioners is to be the rule, Congress must make it so in clear and unmistakable language.[11]

The judgment of the Court of Appeals in each of these cases is affirmed.

It is so ordered.

JUSTICE STEVENS, dissenting.

The plain language of § 6501(c)(1) of the Internal Revenue Code conveys a different message to me than it does to the

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[11] See generally Brennan, The Uncertain Status of Amended Tax Returns, 7 Rev. of Taxation of Individuals 235, 252-264 (1983).

Court. That language is clear enough: "In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time." 26 U. S. C. § 6501(c)(1). What is not clear to me is why this is a case of "a false or fraudulent return."

In both cases before the Court, the Commissioner assessed deficiencies based on concededly nonfraudulent returns. The taxpayers' alleged prior fraud was not the basis for the Commissioner's action. Indeed, whether or not the Commissioner was obligated to accept petitioners' amended returns, he in fact elected to do so and to use them as the basis for his assessment.[1] When the Commissioner initiates a deficiency proceeding on the basis of a nonfraudulent return, I do not believe that the resulting case is one "of a false or fraudulent return."

The purpose of the statute supports this reading. The original version of § 6501(c) was enacted in 1921. It was true in 1921, as it is today, that the fraudulent concealment of the facts giving rise to a claim tolled the controlling statute of limitations until full disclosure was made. Fraud did not entirely repeal the bar of limitations; rather the period of limitations simply did not begin to run until the fraud was discovered, or at least discoverable. See, *e. g.*, *Exploration Co.* v. *United States*, 247 U. S. 435 (1918). Moreover, this Court soon ruled that if a return constitutes an honest and genuine attempt to satisfy the law, it is sufficient to commence the running of the statute of limitations. *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172 (1934).[2] The Court has subsequently adhered to this position. See *Commissioner* v.

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[1] Applicable regulations indicate that the amended returns filed by petitioners must be the basis for his assessment. See Treas. Reg. § 301.6211-1(a), 26 CFR § 301.6211-1(a) (1983).

[2] See also *Florsheim Bros. Co.* v. *United States*, 280 U. S. 453, 462 (1930).

Lane-Wells Co., 321 U. S. 219 (1944); *Germantown Trust Co.* v. *Commissioner*, 309 U. S. 304 (1940). For example, the Court has construed another portion of the statute, dealing with underreporting of income, as inapplicable to returns which disclose the facts forming the basis for the deficiency.

> "We think that in enacting [the statute] Congress manifested no broader purpose than to give the Commissioner an additional two years to investigate tax returns in cases where, because of a taxpayer's omission to report some taxable item, the Commissioner is at a special disadvantage in detecting errors. In such instances the return on its face provides no clue as to the existence of the omitted item. On the other hand, when, as here, the understatement of a tax arises from an error in reporting an item disclosed on the face of the return the Commissioner is at no such disadvantage." *Colony, Inc.* v. *Commissioner*, 357 U. S. 28, 36 (1958).

In light of the purposes and common-law background of the statute, as well as this Court's previous treatment of what a "return" sufficient to commence the running of the limitations period is, it seems apparent that an assessment based on a nonfraudulent amended return does not fall within § 6501(c)(1). Once the amended return is filed the rationale for disregarding the limitations period is absent. The period of concealment is over, and under general common-law principles the limitations period should begin to run.[3] The filing of the return means that the Commissioner is no longer under any disadvantage; full disclosure has been made and there is no reason why he cannot assess a deficiency within the statutory period.

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[3] It is axiomatic that statutes in derogation of the common law should be narrowly construed, as the Court pointed out earlier this Term. See *Norfolk Redevelopment & Housing Authority* v. *Chesapeake & Potomac Tel. Co.*, *ante*, at 35–36.

The 1921 statute read as follows:

> "[I]n the case of a false or fraudulent return with intent to evade tax, or of a failure to file a required return, the amount of tax due may be determined, assessed, and collected, and a suit or proceeding for the collection of such amount may be begun, at any time after it becomes due." Revenue Act of 1921, § 250(d), 42 Stat. 265.

Under this statute, the filing of a fraudulent return had no greater effect on the limitations period than the filing of no return at all. In either case, since the relevant facts had not been disclosed to the Commissioner, the proper tax could be assessed "at any time." In 1954 the statute was bifurcated; the provisions relating to a failure to file were placed into § 6501(c)(3).[4] The legislative history of this revision indicates that the division was not intended to change the statute's meaning.[5] This history supports petitioners' reading of the statute. Fraudulent returns were treated the same as no return at all since neither gives the Commissioner an adequate basis to attempt an assessment. Once that basis is provided, however, the statute is inapplicable; it is no longer a "case of a false or fraudulent return."

The Commissioner practically concedes as much since he agrees with the ruling in *Bennett* v. *Commissioner*, 30 T. C. 114 (1958), acq., 1958–2 Cum. Bull. 3, that if the taxpayer fraudulently fails to file a return, the limitations period nevertheless begins to run once a nonfraudulent return is filed. See also Rev. Rul. 79–178, 1979–1 Cum. Bull. 435. Yet there is nothing in the history of this statute indicating that Congress intended a bifurcated reading of a simple statutory command. There is certainly no logical reason supporting such a result; the Commissioner is if anything under a greater disadvantage when the taxpayer originally filed no return at all, since at least in the (c)(1) situation the Commissioner can compare the two returns. If the Commissioner can assess a deficiency within three years when no return was previously filed, he can do the same if the original return was fraudulent.[6]

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[4] "In the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time." 26 U. S. C. § 6501(c)(3).

[5] See S. Rep. No. 1622, 83d Cong., 2d Sess., 583–585 (1954); H. R. Rep. No. 1337, 83d Cong., 2d Sess., A413–A414 (1954).

Whatever the correct standard for construing a statute of limitations when it operates against the Government, see *ante*, at 391–392, surely the presumption ought to be that *some* limitations period is applicable.

> "It probably would be all but intolerable, at least Congress has regarded it as ill-advised, to have an income tax system under which there never would come a day of final settlement and which required both the taxpayer and the Government to stand ready forever and a day to produce vouchers, prove events, establish values and recall details of all that goes into an income tax contest. Hence, a statute of limitation is an almost indispensable

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[6] The Court attempts to justify its position by reference to § 6501(e)(1)(A), which provides a 6-year limitations period for a taxpayer who nonfraudulently omits more than 25% of his or her gross income, noting that the taxpayer cannot escape this extended period by filing an amended return. *Ante*, at 395–396. However, this Court has never so held; the majority justifies its position only by assuming its conclusion as to the correct construction of § 6501(e)(1)(A), an issue not before the Court. The Court cites only two old Tax Court decisions neither of which considers the arguments advanced by petitioners here. See *Houston* v. *Commissioner*, 38 T. C. 486 (1962); *Goldring* v. *Commissioner*, 20 T. C. 79 (1953). Moreover, it is incorrect that the taxpayer who files a fraudulent return is in a better position than the taxpayer who innocently understates his income by more than 25%, since the former is subject to criminal penalties under a 6-year statute of limitations. See 26 U. S. C. § 6531. He is also subject to a 50% penalty. See 26 U. S. C. § 6653(b). Thus, both taxpayers face the same limitations period, though the sanctions faced by the former are much more severe. Finally, the Commissioner is in no position to rely on a disparity of treatment between two separate parts of the statute, §§ 6501(c)(1) and 6501(e)(1)(A), since he is willing to tolerate disparate treatment between (c)(1) and (c)(3), which have the same statutory origin and purpose.

> element of fairness as well as of practical administration of an income tax policy." *Rothensies* v. *Electric Storage Battery Co.*, 329 U. S. 296, 301 (1946).

However, under the Commissioner's position, adopted by the Court today, no limitations period will *ever* apply to the Commissioner's actions, despite petitioners' attempts to provide him with all the information necessary to make a timely assessment.

> "Respondent would leave the statute open for that portion of eternity concurrent with the taxpayer's life, whether he lives 3 score and 10 or as long as Methuselah. In most religions, one can repent and be saved, but in the peculiar tax theology of respondent, no act of contrition will suffice to prevent the statute from running in perpetuity. Merely to state the proposition is to refute it, unless some very compelling reasons of policy require visiting this absurdity on the taxpayer." *Klemp* v. *Commissioner*, 77 T. C. 201, 207 (1981) (Wilbur, J., concurring).[7]

If anything, considerations of tax policy argue against the result reached by the Court today. In a system based on voluntary compliance, it is crucial that some incentive be given to persons to reveal and correct past fraud. Yet the rule announced by the Court today creates no such incentive; a taxpayer gets no advantage at all by filing an honest return. Not only does the taxpayer fail to gain the benefit of a limitations period, but at the same time he gives the Commissioner additional information which can be used against him at any time. Since the amended return will not give the taxpayer a defense in a criminal or civil fraud action, see *ante*, at 394, there is no reason at all for a taxpayer to correct a fraudulent return. Apparently the Court believes that taxpayers should be advised to remain silent, hoping the fraud will go undetected, rather than to make full disclosure in a proper return. I cannot believe that Congress intended such a result.[8]

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[7] Even Judge Wilbur's estimation of the sweep of the Commissioner's position may be too modest, for under § 6901(c)(1) the Commissioner is entitled to assess deficiencies against a taxpayer's beneficiaries after his or her death for one year after the limitations period runs. Since the limitations period will never run, the Commissioner may presumably hound a taxpayer's beneficiaries and their descendants in perpetuity.

I respectfully dissent.

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[8] The Court also argues that the Commissioner cannot be expected to comply with a limitations period since his civil investigation will be hampered if he has referred the fraud case to the Department of Justice for criminal prosecution. *Ante*, at 399. If that is the problem, however, then in an appropriate case the limitations period could be tolled during the pendency of the criminal investigation. Tolling during periods in which an action could not reasonably have been brought is much more in accord with usual limitations principles than the result the Court reaches today. Additionally, the conflicting demands of dual civil and criminal investigations are evidently no obstacle to the Commissioner in the fraudulent-failure-to-file context, since the Commissioner there is able to live with a 3-year limitations period. In any event, the need to conduct criminal investigations, which in all events must end or result in an indictment within six years, does not justify the power to assess deficiencies in perpetuity, and even in cases, such as No. 82-1509, where no reference to the Department of Justice is ever made.

DONOVAN, SECRETARY OF LABOR, ET AL. *v.* LONE STEER, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

No. 82-1684. Argued November 29, 1983—Decided January 17, 1984

The Secretary of Labor (Secretary) is authorized by § 11(a) of the Fair Labor Standards Act of 1938 (FLSA) to investigate and gather data regarding wages, hours, and other conditions of employment to determine whether an employer is violating the Act, and by § 9 to subpoena witnesses and documentary evidence relating to any matter under investigation. Pursuant to these provisions, a Department of Labor official, upon entering appellee motel and restaurant, served an administrative subpoena *duces tecum* on one of appellee's employees, directing the employee to appear at the regional Wage and Hour Office with certain payroll and sales records. Appellee refused to comply with the subpoena and sought declaratory and injunctive relief in Federal District Court, claiming that the subpoena constituted an unlawful search and seizure in violation of the Fourth Amendment. The District Court held that, although the Secretary had complied with the applicable FLSA provisions in issuing the subpoena, enforcement of the subpoena would violate the Fourth Amendment because the Secretary had not previously obtained a judicial warrant.

Held: The subpoena *duces tecum* did not violate the Fourth Amendment. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, controlling. An entry into the public lobby of a motel and restaurant for the purpose of serving an administrative subpoena is not the sort of governmental act that is forbidden by that Amendment. Here, the subpoena itself did not authorize either entry or inspection of appellee's premises but merely directed appellee to produce certain wage and hour records, and no nonconsensual entry into areas not open to the public was made. *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, and *Camara* v. *Municipal Court*, 387 U. S. 523, distinguished. While a subpoenaed employer, in an action in federal district court, may question the reasonableness of a subpoena before suffering any penalties for refusing to comply with it, the available defenses do not include the right to insist upon a judicial warrant as a condition precedent to a valid subpoena. Pp. 413–416.

Reversed.

REHNQUIST, J., delivered the opinion for a unanimous Court.

Alan I. Horowitz argued the cause for appellants. With him on the briefs were *Solicitor General Lee, Deputy Solicitor General Geller, Karen I. Ward*, and *Charles I. Hadden.*

Richard G. Peterson argued the cause for appellee. With him on the brief was *James Patrick Barone.**

JUSTICE REHNQUIST delivered the opinion of the Court.

Section 11(a) of the Fair Labor Standards Act of 1938 (FLSA or Act), 52 Stat. 1066, 29 U. S. C. § 211(a), authorizes the Secretary of Labor to investigate and gather data regarding wages, hours, and other conditions of employment to determine whether an employer is violating the Act.[1] Section

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*Briefs of *amici curiae* urging affirmance were filed for the National Restaurant Association by *Robert W. Hartland;* and for the Washington Legal Foundation by *Daniel J. Popeo, Paul D. Kamenar*, and *Nicholas E. Calio.*

Robert E. Williams, Douglas S. McDowell, and *Stephen C. Yohay* filed a brief for the Equal Employment Advisory Council as *amicus curiae.*

[1] Section 11(a), as set forth in 29 U. S. C. § 211(a), provides:

"The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter. Except as provided in section 212 of this title and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 212 of this title, the Administrator shall bring all actions under section 217 of this title to restrain violations of this chapter."

Although § 11(a) grants investigatory authority specifically to the Wage and Hour Administrator, pursuant to Reorg. Plan No. 6 of 1950, 3 CFR 1004 (1949–1953 comp.), 64 Stat. 1263, 5 U. S. C. App. p. 743, the functions of all officers of the Department of Labor, including the Wage and Hour Administrator, are transferred to the Secretary of Labor, who may in turn delegate those functions.

9 of the FLSA, 29 U. S. C. § 209, empowers the Secretary of Labor to subpoena witnesses and documentary evidence relating to any matter under investigation.[2] Pursuant to those provisions, an official of the Department of Labor served an administrative subpoena *duces tecum* on an employee of appellee Lone Steer, Inc., a motel and restaurant located in Steele, N. D. The subpoena directed an officer or agent of appellee with personal knowledge of appellee's records to appear at the Wage and Hour Division of the United States Department of Labor in Bismarck, N. D., and

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[2] Section 9 of the FLSA provides that for the purpose of any hearing or investigation under the provisions of the Act, § 9 of the Federal Trade Commission Act of 1914, 38 Stat. 722, as amended, 15 U. S. C. § 49, is made applicable "to the jurisdiction, powers, and duties of the Administrator, the Secretary of Labor and the industry committees." Section 9 of the Federal Trade Commission Act of 1914, as set forth in 15 U. S. C. § 49, provides in pertinent part:

"[T]he Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership, or corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpoenas, and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence.

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

"Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, partnership, or corporation issue an order requiring such person, partnership, or corporation to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

to produce certain payroll and sales records. In an action filed by appellee to challenge the validity of the subpoena, the District Court for the District of North Dakota held that, although the Secretary of Labor had complied with the applicable provisions of the FLSA in issuing the subpoena, enforcement of the subpoena would violate the Fourth Amendment of the United States Constitution because the Secretary had not previously obtained a judicial warrant. We noted probable jurisdiction of the Secretary's appeal, 462 U. S. 1105 (1983), and we now reverse the judgment of the District Court.

On January 6, 1982, Al Godes, a Compliance Officer with the Wage and Hour Division of the Department of Labor, telephoned Susanne White, appellee's manager, to inform her that he intended to begin an investigation of appellee the following morning and to request that she have available for inspection payroll records for all employees for the past two years. White telephoned Godes later that day to inform him that it would not be convenient to conduct the inspection on the following morning. After some preliminary skirmishing between the parties, during which appellee inquired about the scope and reason for the proposed investigation and appellants declined to provide specific information, Godes and Gerald Hill, Assistant Area Director from the Wage and Hour Division in Denver, arrived at appellee's premises on February 2, 1982, for the purpose of conducting the investigation. After waiting for White, Godes served the administrative subpoena at issue here on one of appellee's other employees. The subpoena was directed to any employee of appellee having custody and personal knowledge of the records specifically described therein, records which appellee was required by law to maintain. See 29 CFR §§516.2(a), 516.5(c) (1983). The subpoena directed the employee to appear with those records at the Wage and Hour Division of the Department of Labor in Bismarck, N. D.

Appellee refused to comply with the subpoena and sought declaratory and injunctive relief in the District Court, claiming that the subpoena constituted an unlawful search and seizure in violation of the Fourth Amendment. Appellants counterclaimed for enforcement of the subpoena. The District Court concluded that the actions of appellants in issuing the administrative subpoena "unquestionably comport with the provisions of the Fair Labor Standards Act, as amended, 29 U. S. C. § 201, *et seq.*" App. A to Juris. Statement 6a. Relying on our decision in *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307 (1978), however, the District Court held that the applicable provisions of the FLSA violate the Fourth Amendment insofar as they authorize the Secretary of Labor to issue an administrative subpoena without previously having obtained a judicial warrant. In *Barlow's* this Court declared unconstitutional the provisions of the Occupational Safety and Health Act of 1970 (OSHA) which authorized inspectors to enter an employer's premises without a warrant to conduct inspections of work areas. The District Court rejected appellants' arguments that *Barlow's* is not dispositive of the issue here by stating:

> "It is reasonable to conclude that the exigencies of an entry upon commercial premises for the purpose of conducting a safety and health inspection designed to protect the personal well-being of employees supply more compelling bases for proceeding without a warrant than the circumstances presented here, where entry is sought for the purpose of determining compliance with wage and hour regulations. The reasoning of the Supreme Court in *Barlow's* applies with equal—if not greater—force in the instant situation.
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> "In sum, I hold that the Secretary of Labor may *not* proceed to enter upon the premises of Lone Steer, Inc., for the purpose of inspecting its records under SECTION 11 of the Fair Labor Standards Act without first having

> obtained a valid warrant." App. A to Juris. Statement 8a.[3]

We think that the District Court undertook to decide a case not before it when it held that appellants may not "enter upon the premises" of appellee to inspect its records without first having obtained a warrant. The only "entry" upon appellee's premises by appellants, so far as the record discloses, is that of Godes on February 2, 1982, when he and Gerald Hill entered the motel and restaurant to attempt to conduct an investigation. The stipulation of facts entered into by the parties, App. 11–17, and incorporated into the opinion of the District Court, App. A to Juris. Statement 2a–8a, describe what happened next:

> "They asked for Ms. White and were told she was not available but expected shortly. They were offered some coffee, and waited in the lobby area. After 20–30 minutes, when Ms. White had not appeared, Mr. Godes served an Administrative Subpoena Duces Tecum on employee Karen Arnold." App. 15.

An entry into the public lobby of a motel and restaurant for the purpose of serving an administrative subpoena is scarcely the sort of governmental act which is forbidden by the Fourth Amendment. The administrative subpoena itself did not authorize either entry or inspection of appellee's premises; it merely directed appellee to produce relevant wage and hour records at appellants' regional office some 25 miles away.

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[3] Because the District Court's order seemed only to bar "entry" onto appellee's premises, appellants filed a motion to alter or amend the judgment, arguing that the District Court's order did "not address the relief sought by the Secretary." App. A to Juris. Statement 15a. They sought to amend the District Court's order so as to compel appellee to produce documents at appellants' Bismarck office, emphasizing that compliance with such an order would not require an "entry" onto appellee's premises. The District Court denied the motion without opinion. *Id.*, at 13a–14a.

The governmental actions which required antecedent administrative warrants in *Marshall* v. *Barlow's, Inc., supra*, and *Camara* v. *Municipal Court*, 387 U. S. 523 (1967), are quite different from the governmental action in this case. In *Barlow's* an OSHA inspector sought to conduct a search of nonpublic working areas of an electrical and plumbing installation business. In *Camara* a San Francisco housing inspector sought to inspect the premises of an apartment building in that city. See also *See* v. *City of Seattle*, 387 U. S. 541 (1967) (involving a similar search by a fire inspector of commercial premises). In each case, this Court held that an administrative warrant was required before such a search could be conducted without the consent of the owner of the premises.

It is plain to us that those cases turned upon the effort of the government inspectors to make nonconsensual entries into areas not open to the public. As we have indicated, no such entry was made by appellants in this case. Thus the enforceability of the administrative subpoena *duces tecum* at issue here is governed, not by our decision in *Barlow's* as the District Court concluded, but rather by our decision in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186 (1946). In *Oklahoma Press* the Court rejected an employer's claim that the subpoena power conferred upon the Secretary of Labor by the FLSA violates the Fourth Amendment.

> "The short answer to the Fourth Amendment objections is that the records in these cases present no question of actual search and seizure, but raise only the question whether orders of court for the production of specified records have been validly made; and no sufficient showing appears to justify setting them aside. No officer or other person has sought to enter petitioners' premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to orders of court authorized by law

> and made after adequate opportunity to present objections . . . ." *Id.*, at 195 (footnotes omitted).

We cited *Oklahoma Press* with approval in *See* v. *City of Seattle, supra*, a companion case to *Camara*, and described the constitutional requirements for administrative subpoenas as follows:

> "It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." *See* v. *City of Seattle, supra*, at 544 (footnote omitted).

See also *United States* v. *Morton Salt Co.*, 338 U. S. 632, 652–653 (1950).

Thus although our cases make it clear that the Secretary of Labor may issue an administrative subpoena without a warrant, they nonetheless provide protection for a subpoenaed employer by allowing him to question the reasonableness of the subpoena, before suffering any penalties for refusing to comply with it, by raising objections in an action in district court. *See* v. *City of Seattle, supra*, at 544–545; *Oklahoma Press, supra*, at 208–209. Our holding here, which simply reaffirms our holding in *Oklahoma Press*, in no way leaves an employer defenseless against an unreasonably burdensome administrative subpoena requiring the production of documents. We hold only that the defenses available to an employer do not include the right to insist upon a judicial warrant as a condition precedent to a valid administrative subpoena.

Appellee insists that "[t]he official inspection procedure used by the appellants reveal[s] that the use of the administrative subpoena is inextricably intertwined with the entry process," Brief for Appellee 11, and states that it is appellants' established policy to seek entry inspections by expressly relying on its inspection authority under § 11 of the FLSA. *Id.*, at 12. We need only observe that no nonconsensual entry into protected premises was involved in this case.

The judgment of the District Court is accordingly

Reversed.

SONY CORPORATION OF AMERICA ET AL. *v.* UNIVERSAL CITY STUDIOS, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-1687. Argued January 18, 1983—Reargued October 3, 1983—Decided January 17, 1984

Petitioner Sony Corp. manufactures home video tape recorders (VTR's), and markets them through retail establishments, some of which are also petitioners. Respondents own the copyrights on some of the television programs that are broadcast on the public airwaves. Respondents brought an action against petitioners in Federal District Court, alleging that VTR consumers had been recording some of respondents' copyrighted works that had been exhibited on commercially sponsored television and thereby infringed respondents' copyrights, and further that petitioners were liable for such copyright infringement because of their marketing of the VTR's. Respondents sought money damages, an equitable accounting of profits, and an injunction against the manufacture and marketing of the VTR's. The District Court denied respondents all relief, holding that noncommercial home use recording of material broadcast over the public airwaves was a fair use of copyrighted works and did not constitute copyright infringement, and that petitioners could not be held liable as contributory infringers even if the home use of a VTR was considered an infringing use. The Court of Appeals reversed, holding petitioners liable for contributory infringement and ordering the District Court to fashion appropriate relief.

Held: The sale of the VTR's to the general public does not constitute contributory infringement of respondents' copyrights. Pp. 428-456.

(a) The protection given to copyrights is wholly statutory, and, in a case like this, in which Congress has not plainly marked the course to be followed by the judiciary, this Court must be circumspect in construing the scope of rights created by a statute that never contemplated such a calculus of interests. Any individual may reproduce a copyrighted work for a "fair use"; the copyright owner does not possess the exclusive right to such a use. Pp. 428-434.

(b) *Kalem Co.* v. *Harper Brothers*, 222 U. S. 55, does not support respondents' novel theory that supplying the "means" to accomplish an infringing activity and encouraging that activity through advertisement are sufficient to establish liability for copyright infringement. This case does not fall in the category of those in which it is manifestly just to impose vicarious liability because the "contributory" infringer was in a position to control the use of copyrighted works by others and had authorized the use without permission from the copyright owner. Here, the only contact between petitioners and the users of the VTR's occurred at the moment of sale. And there is no precedent for imposing vicarious liability on the theory that petitioners sold the VTR's with constructive knowledge that their customers might use the equipment to make unauthorized copies of copyrighted material. The sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes, or, indeed, is merely capable of substantial noninfringing uses. Pp. 434–442.

(c) The record and the District Court's findings show (1) that there is a significant likelihood that substantial numbers of copyright holders who license their works for broadcast on free television would not object to having their broadcast time-shifted by private viewers (*i. e.*, recorded at a time when the VTR owner cannot view the broadcast so that it can be watched at a later time); and (2) that there is no likelihood that time-shifting would cause nonminimal harm to the potential market for, or the value of, respondents' copyrighted works. The VTR's are therefore capable of substantial noninfringing uses. Private, noncommercial time-shifting in the home satisfies this standard of noninfringing uses both because respondents have no right to prevent other copyright holders from authorizing such time-shifting for their programs, and because the District Court's findings reveal that even the unauthorized home time-shifting of respondents' programs is legitimate fair use. Pp. 442–456.

659 F. 2d 963, reversed.

STEVENS, J., delivered the opinion of the Court in which BURGER, C. J., and BRENNAN, WHITE, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a dissenting opinion in which MARSHALL, POWELL, and REHNQUIST, JJ., joined, *post*, p. 457.

Dean C. Dunlavey reargued the cause for petitioners. With him on the briefs were *Donald E. Sloan* and *Marshall Rutter*.

Stephen A. Kroft reargued the cause for respondents. With him on the brief was *Sondra E. Berchin*.*

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*Briefs of *amici curiae* urging reversal were filed for the Virginia Citizens' Consumer Council, Inc., et al. by *William A. Dobrovir;* for the American Library Association by *Newton N. Minow;* for the Consumer Electronics Group by *J. Edward Day;* for the Educators Ad Hoc Committee on

JUSTICE STEVENS delivered the opinion of the Court.

Petitioners manufacture and sell home video tape recorders. Respondents own the copyrights on some of the tele-

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Copyright Law by *Michael H. Cardozo, August W. Steinhilber,* and *Gwendolyn H. Gregory;* for General Electric Co. et al. by *Alfred B. Engelberg, Morton Amster, Jesse Rothstein,* and *Joel E. Lutzker;* for Hitachi, Ltd., et al. by *John W. Armagost* and *Craig B. Jorgensen;* for McCann-Erickson, Inc., et al. by *John A. Donovan, A. Howard Matz,* and *David Fleischer;* for Minnesota Mining and Manufacturing Co. et al. by *Sidney A. Diamond* and *Grier Curran Raclin;* for the National Retail Merchants Association by *Peter R. Stern, Theodore S. Steingut,* and *Robert A. Weiner;* for Sanyo Electric, Inc., by *Anthony Liebig;* for Sears, Roebuck and Co. by *Max L. Gillam* and *Mary E. Woytek;* for TDK Electronics Co., Ltd., by *Ko-Yung Tung* and *Adam Yarmolinsky;* for Toshiba Corp. et al. by *Donald J. Zoeller* and *Herve Gouraige;* for Pfizer Inc. by *Steven C. Kany;* and for Viare Publishing by *Peter F. Marvin.*

Briefs of *amici curiae* urging affirmance were filed for the Association of American Publishers, Inc., et al. by *Charles H. Lieb* and *Jon A. Baumgarten;* for the Authors League of America, Inc., by *Irwin Karp;* for CBS Inc. by *Lloyd N. Cutler, Louis R. Cohen,* and *George Vradenburg III;* for Creators and Distributors of Programs by *Stuart Robinowitz* and *Andrew J. Peck;* for the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL–CIO, by *Leo Geffner;* for the Motion Picture Association of America, Inc., by *Richard M. Cooper, Ellen S. Huvelle,* and *William Nix;* for the National Music Publishers' Association, Inc., by *Jon A. Baumgarten;* for the Recording Industry Association of America, Inc., by *James F. Fitzpatrick, Cary H. Sherman,* and *Ernest S. Meyers;* for Volunteer Lawyers for the Arts, Inc., by *I. Fred Koenigsberg;* and for the Writers Guild of America, West, Inc., et al. by *Paul P. Selvin, Jerome B. Lurie,* and *Paul S. Berger.*

Briefs of *amici curiae* were filed for the State of Missouri et al. by *John Ashcroft,* Attorney General of Missouri, and by the Attorneys General for their respective States as follows: *Charles A. Graddick* of Alabama, *John Steven Clark* of Arkansas, *Michael J. Bowers* of Georgia, *Tany S. Hong* of Hawaii, *Tyrone C. Fahner* of Illinois, *Thomas J. Miller* of Iowa, *William J. Guste, Jr.,* of Louisiana, *William A. Allain* of Mississippi, *Michael T. Greely* of Montana, *Rufus L. Edmisten* of North Carolina, *William J. Brown* of Ohio, *Jan Eric Cartwright* of Oklahoma, *Dennis J. Roberts II* of Rhode Island, *John J. Easton* of Vermont, *Gerald L. Baliles* of Virginia, and *Bronson C. La Follette* of Wisconsin; and for the Committee on Copy-vision programs that are broadcast on the public airwaves. Some members of the general public use video tape recorders sold by petitioners to record some of these broadcasts, as well as a large number of other broadcasts. The question presented is whether the sale of petitioners' copying equipment to the general public violates any of the rights conferred upon respondents by the Copyright Act.

Respondents commenced this copyright infringement action against petitioners in the United States District Court for the Central District of California in 1976. Respondents alleged that some individuals had used Betamax video tape recorders (VTR's) to record some of respondents' copyrighted works which had been exhibited on commercially sponsored television and contended that these individuals had thereby infringed respondents' copyrights. Respondents further maintained that petitioners were liable for the copyright infringement allegedly committed by Betamax consumers because of petitioners' marketing of the Betamax VTR's.[1] Respondents sought no relief against any Betamax consumer. Instead, they sought money damages and an equitable accounting of profits from petitioners, as well as an injunction against the manufacture and marketing of Betamax VTR's.

After a lengthy trial, the District Court denied respondents all the relief they sought and entered judgment for petitioners. 480 F. Supp. 429 (1979). The United States Court of Appeals for the Ninth Circuit reversed the District Court's judgment on respondents' copyright claim, holding petitioners liable for contributory infringement and ordering the District Court to fashion appropriate relief. 659 F. 2d 963

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right and Literary Property of the Association of the Bar of the City of New York by *Michael S. Oberman* and *David H. Marks*.

[1] The respondents also asserted causes of action under state law and § 43(a) of the Trademark Act of 1946, 60 Stat. 441, 15 U. S. C. § 1125(a). These claims are not before this Court.

(1981). We granted certiorari, 457 U. S. 1116 (1982); since we had not completed our study of the case last Term, we ordered reargument, 463 U. S. 1226 (1983). We now reverse.

An explanation of our rejection of respondents' unprecedented attempt to impose copyright liability upon the distributors of copying equipment requires a quite detailed recitation of the findings of the District Court. In summary, those findings reveal that the average member of the public uses a VTR principally to record a program he cannot view as it is being televised and then to watch it once at a later time. This practice, known as "time-shifting," enlarges the television viewing audience. For that reason, a significant amount of television programming may be used in this manner without objection from the owners of the copyrights on the programs. For the same reason, even the two respondents in this case, who do assert objections to time-shifting in this litigation, were unable to prove that the practice has impaired the commercial value of their copyrights or has created any likelihood of future harm. Given these findings, there is no basis in the Copyright Act upon which respondents can hold petitioners liable for distributing VTR's to the general public. The Court of Appeals' holding that respondents are entitled to enjoin the distribution of VTR's, to collect royalties on the sale of such equipment, or to obtain other relief, if affirmed, would enlarge the scope of respondents' statutory monopolies to encompass control over an article of commerce that is not the subject of copyright protection. Such an expansion of the copyright privilege is beyond the limits of the grants authorized by Congress.

I

The two respondents in this action, Universal City Studios, Inc., and Walt Disney Productions, produce and hold the copyrights on a substantial number of motion pictures and other audiovisual works. In the current marketplace, they can exploit their rights in these works in a number of ways:

by authorizing theatrical exhibitions, by licensing limited showings on cable and network television, by selling syndication rights for repeated airings on local television stations, and by marketing programs on prerecorded videotapes or videodiscs. Some works are suitable for exploitation through all of these avenues, while the market for other works is more limited.

Petitioner Sony manufactures millions of Betamax video tape recorders and markets these devices through numerous retail establishments, some of which are also petitioners in this action.[2] Sony's Betamax VTR is a mechanism consisting of three basic components: (1) a tuner, which receives electromagnetic signals transmitted over the television band of the public airwaves and separates them into audio and visual signals; (2) a recorder, which records such signals on a magnetic tape; and (3) an adapter, which converts the audio and visual signals on the tape into a composite signal that can be received by a television set.

Several capabilities of the machine are noteworthy. The separate tuner in the Betamax enables it to record a broadcast off one station while the television set is tuned to another channel, permitting the viewer, for example, to watch two simultaneous news broadcasts by watching one "live" and recording the other for later viewing. Tapes may be reused, and programs that have been recorded may be erased either before or after viewing. A timer in the Betamax can be used to activate and deactivate the equipment at predetermined

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[2] The four retailers are Carter Hawley Hales Stores, Inc., Associated Dry Goods Corp., Federated Department Stores, Inc., and Henry's Camera Corp. The principal defendants are Sony Corporation, the manufacturer of the equipment, and its wholly owned subsidiary, Sony Corporation of America. The advertising agency of Doyle Dane Bernback, Inc., also involved in marketing the Betamax, is also a petitioner. An individual VTR user, William Griffiths, was named as a defendant in the District Court, but respondents sought no relief against him. Griffiths is not a petitioner. For convenience, we shall refer to petitioners collectively as Sony.

times, enabling an intended viewer to record programs that are transmitted when he or she is not at home. Thus a person may watch a program at home in the evening even though it was broadcast while the viewer was at work during the afternoon. The Betamax is also equipped with a pause button and a fast-forward control. The pause button, when depressed, deactivates the recorder until it is released, thus enabling a viewer to omit a commercial advertisement from the recording, provided, of course, that the viewer is present when the program is recorded. The fast-forward control enables the viewer of a previously recorded program to run the tape rapidly when a segment he or she does not desire to see is being played back on the television screen.

The respondents and Sony both conducted surveys of the way the Betamax machine was used by several hundred owners during a sample period in 1978. Although there were some differences in the surveys, they both showed that the primary use of the machine for most owners was "time-shifting"—the practice of recording a program to view it once at a later time, and thereafter erasing it. Time-shifting enables viewers to see programs they otherwise would miss because they are not at home, are occupied with other tasks, or are viewing a program on another station at the time of a broadcast that they desire to watch. Both surveys also showed, however, that a substantial number of interviewees had accumulated libraries of tapes.[3] Sony's survey indicated

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[3] As evidence of how a VTR may be used, respondents offered the testimony of William Griffiths. Griffiths, although named as an individual defendant, was a client of plaintiffs' law firm. The District Court summarized his testimony as follows:

"He owns approximately 100 tapes. When Griffiths bought his Betamax, he intended not only to time-shift (record, play-back and then erase) but also to build a library of cassettes. Maintaining a library, however, proved too expensive, and he is now erasing some earlier tapes and reusing them.

"Griffiths copied about 20 minutes of a Universal motion picture called 'Never Give An Inch,' and two episodes from Universal television series that over 80% of the interviewees watched at least as much regular television as they had before owning a Betamax.[4] Respondents offered no evidence of decreased television viewing by Betamax owners.[5]

Sony introduced considerable evidence describing television programs that could be copied without objection from any copyright holder, with special emphasis on sports, religious, and educational programming. For example, their survey indicated that 7.3% of all Betamax use is to record sports events, and representatives of professional baseball, football, basketball, and hockey testified that they had no objection to the recording of their televised events for home use.[6]

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entitled 'Baa Baa Black Sheep' and 'Holmes and Yo Yo.' He would have erased each of these but for the request of plaintiffs' counsel that it be kept. Griffiths also testified that he had copied but already erased Universal films called 'Alpha Caper' (erased before anyone saw it) and 'Amelia Earhart.' At the time of his deposition Griffiths did not intend to keep any Universal film in his library.

"Griffiths has also recorded documentaries, news broadcasts, sporting events and political programs such as a rerun of the Nixon/Kennedy debate." 480 F. Supp. 429, 436–437 (1979).

Four other witnesses testified to having engaged in similar activity.

[4] The District Court summarized some of the findings in these surveys as follows:

"According to plaintiffs' survey, 75.4% of the VTR owners use their machines to record for time-shifting purposes half or most of the time. Defendants' survey showed that 96% of the Betamax owners had used the machine to record programs they otherwise would have missed.

"When plaintiffs asked interviewees how many cassettes were in their library, 55.8% said there were 10 or fewer. In defendants' survey, of the total programs viewed by interviewees in the past month, 70.4% had been viewed only that one time and for 57.9%, there were no plans for further viewing." *Id.*, at 438.

[5] "81.9% of the defendants' interviewees watched the same amount or more of regular television as they did before owning a Betamax. 83.2% reported their frequency of movie going was unaffected by Betamax." *Id.*, at 439.

[6] See Defendants' Exh. OT, Table 20; Tr. 2447–2450, 2480, 2486–2487, 2515–2516, 2530–2534.

Respondents offered opinion evidence concerning the future impact of the unrestricted sale of VTR's on the commercial value of their copyrights. The District Court found, however, that they had failed to prove any likelihood of future harm from the use of VTR's for time-shifting. 480 F. Supp., at 469.

The District Court's Decision

The lengthy trial of the case in the District Court concerned the private, home use of VTR's for recording programs broadcast on the public airwaves without charge to the viewer.[7] No issue concerning the transfer of tapes to other persons, the use of home-recorded tapes for public performances, or the copying of programs transmitted on pay or cable television systems was raised. See *id.*, at 432–433, 442.

The District Court concluded that noncommercial home use recording of material broadcast over the public airwaves was a fair use of copyrighted works and did not constitute copyright infringement. It emphasized the fact that the material was broadcast free to the public at large, the noncommercial character of the use, and the private character of the activity conducted entirely within the home. Moreover, the court found that the purpose of this use served the public interest in increasing access to television programming, an interest that "is consistent with the First Amendment policy of providing the fullest possible access to information through the public airwaves. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94, 102." *Id.*, at 454.[8] Even when an entire copyrighted work was recorded, the District Court regarded the copying as fair use "because there is no accompanying reduction in the market for 'plaintiff's original work.'" *Ibid.*

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[7] The trial also briefly touched upon demonstrations of the Betamax by the retailer petitioners which were alleged to be infringements by respondents. The District Court held against respondents on this claim, 480 F. Supp., at 456–457, the Court of Appeals affirmed this holding, 659 F. 2d 963, 976 (1981), and respondents did not cross-petition on this issue.

[8] The court also found that this "access is not just a matter of convenience, as plaintiffs have suggested. Access has been limited not simply by inconvenience but by the basic need to work. Access to the better pro-

As an independent ground of decision, the District Court also concluded that Sony could not be held liable as a contributory infringer even if the home use of a VTR was considered an infringing use. The District Court noted that Sony had no direct involvement with any Betamax purchasers who recorded copyrighted works off the air. Sony's advertising was silent on the subject of possible copyright infringement, but its instruction booklet contained the following statement:

> "Television programs, films, videotapes and other materials may be copyrighted. Unauthorized recording of such material may be contrary to the provisions of the United States copyright laws." *Id.*, at 436.

The District Court assumed that Sony had constructive knowledge of the probability that the Betamax machine would be used to record copyrighted programs, but found that Sony merely sold a "product capable of a variety of uses, some of them allegedly infringing." *Id.*, at 461. It reasoned:

> "Selling a staple article of commerce—*e. g.*, a typewriter, a recorder, a camera, a photocopying machine—technically contributes to any infringing use subsequently made thereof, but this kind of 'contribution,' if deemed sufficient as a basis for liability, would expand the theory beyond precedent and arguably beyond judicial management.
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> . . . . .
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> ". . . Commerce would indeed be hampered if manufacturers of staple items were held liable as contributory infringers whenever they 'constructively' knew that some purchasers on some occasions would use their product

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gram has also been limited by the competitive practice of counterprogramming." 480 F. Supp., at 454.

> for a purpose which a court later deemed, as a matter of first impression, to be an infringement." *Ibid.*

Finally, the District Court discussed the respondents' prayer for injunctive relief, noting that they had asked for an injunction either preventing the future sale of Betamax machines, or requiring that the machines be rendered incapable of recording copyrighted works off the air. The court stated that it had "found no case in which the manufacturers, distributors, retailers and advertisers of the instrument enabling the infringement were sued by the copyright holders," and that the request for relief in this case "is unique." *Id.*, at 465.

It concluded that an injunction was wholly inappropriate because any possible harm to respondents was outweighed by the fact that "the Betamax could still legally be used to record noncopyrighted material or material whose owners consented to the copying. An injunction would deprive the public of the ability to use the Betamax for this noninfringing off-the-air recording." *Id.*, at 468.

The Court of Appeals' Decision

The Court of Appeals reversed the District Court's judgment on respondents' copyright claim. It did not set aside any of the District Court's findings of fact. Rather, it concluded as a matter of law that the home use of a VTR was not a fair use because it was not a "productive use."[9] It therefore held that it was unnecessary for plaintiffs to prove any harm to the potential market for the copyrighted works, but then observed that it seemed clear that the cumulative effect of mass reproduction made possible by VTR's would tend to diminish the potential market for respondents' works. 659 F. 2d, at 974.

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[9] "Without a 'productive use,' *i. e.* when copyrighted material is reproduced for its intrinsic use, the mass copying of the sort involved in this case precludes an application of fair use." 659 F. 2d, at 971–972.

On the issue of contributory infringement, the Court of Appeals first rejected the analogy to staple articles of commerce such as tape recorders or photocopying machines. It noted that such machines "may have substantial benefit for some purposes" and do not "even remotely raise copyright problems." *Id.*, at 975. VTR's, however, are sold "for the primary purpose of reproducing television programming" and "[v]irtually all" such programming is copyrighted material. *Ibid.* The Court of Appeals concluded, therefore, that VTR's were not suitable for any substantial noninfringing use even if some copyright owners elect not to enforce their rights.

The Court of Appeals also rejected the District Court's reliance on Sony's lack of knowledge that home use constituted infringement. Assuming that the statutory provisions defining the remedies for infringement applied also to the nonstatutory tort of contributory infringement, the court stated that a defendant's good faith would merely reduce his damages liability but would not excuse the infringing conduct. It held that Sony was chargeable with knowledge of the homeowner's infringing activity because the reproduction of copyrighted materials was either "the most conspicuous use" or "the major use" of the Betamax product. *Ibid.*

On the matter of relief, the Court of Appeals concluded that "statutory damages may be appropriate" and that the District Court should reconsider its determination that an injunction would not be an appropriate remedy; and, referring to "the analogous photocopying area," suggested that a continuing royalty pursuant to a judicially created compulsory license may very well be an acceptable resolution of the relief issue. *Id.*, at 976.

II

Article I, § 8, of the Constitution provides:

> "The Congress shall have Power . . . To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather. the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

> "The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. In *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 127, Chief Justice Hughes spoke as follows respecting the copyright monopoly granted by Congress, 'The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.' It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius." *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 158 (1948).

As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product. Because this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly.[10]

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[10] In its Report accompanying the comprehensive revision of the Copyright Act in 1909, the Judiciary Committee of the House of Representatives explained this balance:

"The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, . . . but upon the ground that the welfare of the public will be

From its beginning, the law of copyright has developed in response to significant changes in technology.[11] Indeed, it was the invention of a new form of copying equipment—the printing press—that gave rise to the original need for copyright protection.[12] Repeatedly, as new developments have

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served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings. . . .

"In enacting a copyright law Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly." H. R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909).

[11] Thus, for example, the development and marketing of player pianos and perforated rolls of music, see *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U. S. 1 (1908), preceded the enactment of the Copyright Act of 1909; innovations in copying techniques gave rise to the statutory exemption for library copying embodied in § 108 of the 1976 revision of the copyright law; the development of the technology that made it possible to retransmit television programs by cable or by microwave systems, see *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U. S. 390 (1968), and *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, 415 U. S. 394 (1974), prompted the enactment of the complex provisions set forth in 17 U. S. C. § 111(d)(2)(B) and § 111(d)(5) (1982 ed.) after years of detailed congressional study, see *Eastern Microwave, Inc.* v. *Doubleday Sports, Inc.*, 691 F. 2d 125, 129 (CA2 1982).

By enacting the Sound Recording Amendment of 1971, 85 Stat. 391, Congress also provided the solution to the "record piracy" problems that had been created by the development of the audio tape recorder. Sony argues that the legislative history of that Act, see especially H. R. Rep. No. 92–487, p. 7 (1971), indicates that Congress did not intend to prohibit the private home use of either audio or video tape recording equipment. In view of our disposition of the contributory infringement issue, we express no opinion on that question.

[12] "Copyright protection became necessary with the invention of the printing press and had its early beginnings in the British censorship laws. The fortunes of the law of copyright have always been closely connected with freedom of expression, on the one hand, and with technological improvements in means of dissemination, on the other. Successive ages have drawn different balances among the interest of the writer in the control and exploitation of his intellectual property, the related interest of the

occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary. Thus, long before the enactment of the Copyright Act of 1909, 35 Stat. 1075, it was settled that the protection given to copyrights is wholly statutory. *Wheaton* v. *Peters*, 8 Pet. 591, 661–662 (1834). The remedies for infringement "are only those prescribed by Congress." *Thompson* v. *Hubbard*, 131 U. S. 123, 151 (1889).

The judiciary's reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme. See, *e. g.*, *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, 415 U. S. 394 (1974); *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U. S. 390 (1968); *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U. S. 1 (1908); *Williams & Wilkins Co.* v. *United States*, 203 Ct. Cl. 74, 487 F. 2d 1345 (1973), aff'd by an equally divided Court, 420 U. S. 376 (1975). Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.

In a case like this, in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests. In doing so, we are guided by Justice Stewart's exposition of the correct approach to ambiguities in the law of copyright:

> "The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be

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publisher, and the competing interest of society in the untrammeled dissemination of ideas." Foreword to B. Kaplan, An Unhurried View of Copyright vii–viii (1967).

> encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. 'The sole interest of the United States and the primary object in conferring the monopoly,' this Court has said, 'lie in the general benefits derived by the public from the labors of authors.' *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 127. See *Kendall* v. *Winsor*, 21 How. 322, 327–328; *Grant* v. *Raymond*, 6 Pet. 218, 241–242. When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose." *Twentieth Century Music Corp.* v. *Aiken*, 422 U. S. 151, 156 (1975) (footnotes omitted).

Copyright protection "subsists . . . in original works of authorship fixed in any tangible medium of expression." 17 U. S. C. § 102(a) (1982 ed.). This protection has never accorded the copyright owner complete control over all possible uses of his work.[13] Rather, the Copyright Act grants the copyright holder "exclusive" rights to use and to authorize the use of his work in five qualified ways, including reproduction of the copyrighted work in copies. § 106.[14] All reproductions of the work, however, are not within the exclusive domain of the copyright owner; some are in the public domain. Any individual may reproduce a copyrighted work for a "fair use"; the copyright owner does not possess the exclusive right to such a use. Compare § 106 with § 107.

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[13] See, *e. g., White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U. S., at 19; cf. *Deep South Packing Co.* v. *Laitram Corp.*, 406 U. S. 518, 530–531 (1972). While the law has never recognized an author's right to absolute control of his work, the natural tendency of legal rights to express themselves in absolute terms to the exclusion of all else is particularly pronounced in the history of the constitutionally sanctioned monopolies of the copyright and the patent. See, *e. g., United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 156–158 (1948) (copyright owners claiming right to tie license of one film to license of another under copyright law); *Fox Film Corp.* v. *Doyal*, 286 U. S. 123 (1932) (copyright owner claiming copyright renders it immune from state taxation of copyright royalties); *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 349–351 (1908) (copyright owner claiming that a right to fix resale price of his works within the scope of his copyright); *International Business Machines Corp.* v. *United States*, 298

"Anyone who violates any of the exclusive rights of the copyright owner," that is, anyone who trespasses into his exclusive domain by using or authorizing the use of the copyrighted work in one of the five ways set forth in the statute, "is an infringer of the copyright." § 501(a). Conversely, anyone who is authorized by the copyright owner to use the copyrighted work in a way specified in the statute or who makes a fair use of the work is not an infringer of the copyright with respect to such use.

The Copyright Act provides the owner of a copyright with a potent arsenal of remedies against an infringer of his work, including an injunction to restrain the infringer from violat-

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U. S. 131 (1936) (patentees claiming right to tie sale of unpatented article to lease of patented device).

[14] Section 106 of the Act provides:

"Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

"(1) to reproduce the copyrighted work in copies or phonorecords;

"(2) to prepare derivative works based upon the copyrighted work;

"(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

"(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

"(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly."

ing his rights, the impoundment and destruction of all reproductions of his work made in violation of his rights, a recovery of his actual damages and any additional profits realized by the infringer or a recovery of statutory damages, and attorney's fees. §§ 502–505.[15]

The two respondents in this case do not seek relief against the Betamax users who have allegedly infringed their copyrights. Moreover, this is not a class action on behalf of all copyright owners who license their works for television broadcast, and respondents have no right to invoke whatever rights other copyright holders may have to bring infringement actions based on Betamax copying of their works.[16] As was made clear by their own evidence, the copying of the respondents' programs represents a small portion of the total use of VTR's. It is, however, the taping of respondents' own copyrighted programs that provides them with standing to charge Sony with contributory infringement. To prevail, they have the burden of proving that users of the Betamax have infringed their copyrights and that Sony should be held responsible for that infringement.

III

The Copyright Act does not expressly render anyone liable for infringement committed by another. In contrast, the

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[15] Moreover, anyone who willfully infringes the copyright to reproduce a motion picture for purposes of commercial advantage or private financial gain is subject to substantial criminal penalties, 17 U. S. C. § 506(a) (1982 ed.), and the fruits and instrumentalities of the crime are forfeited upon conviction, § 506(b).

[16] In this regard, we reject respondents' attempt to cast this action as comparable to a class action because of the positions taken by *amici* with copyright interests and their attempt to treat the statements made by *amici* as evidence in this case. See Brief for Respondents 1, and n. 1, 6, 52, 53, and n. 116. The stated desires of *amici* concerning the outcome of this or any litigation are no substitute for a class action, are not evidence in the case, and do not influence our decision; we examine an *amicus curiae* brief solely for whatever aid it provides in analyzing the legal questions before us.

Patent Act expressly brands anyone who "actively induces infringement of a patent" as an infringer, 35 U. S. C. § 271(b), and further imposes liability on certain individuals labeled "contributory" infringers, § 271(c). The absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity.[17] For vicarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another.

Such circumstances were plainly present in *Kalem Co.* v. *Harper Brothers*, 222 U. S. 55 (1911), the copyright decision of this Court on which respondents place their principal reliance. In *Kalem*, the Court held that the producer of an unauthorized film dramatization of the copyrighted book Ben Hur was liable for his sale of the motion picture to jobbers, who in turn arranged for the commercial exhibition of the film. Justice Holmes, writing for the Court, explained:

> "The defendant not only expected but invoked by advertisement the use of its films for dramatic reproduc-

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[17] As the District Court correctly observed, however, "the lines between direct infringement, contributory infringement and vicarious liability are not clearly drawn . . . ." 480 F. Supp., at 457–458. The lack of clarity in this area may, in part, be attributable to the fact that an infringer is not merely one who uses a work without authorization by the copyright owner, but also one who authorizes the use of a copyrighted work without actual authority from the copyright owner.

We note the parties' statements that the questions of Sony's liability under the "doctrines" of "direct infringement" and "vicarious liability" are not nominally before this Court. Compare Brief for Respondents 9, n. 22, 41, n. 90, with Reply Brief for Petitioners 1, n. 2. We also observe, however, that reasoned analysis of respondents' unprecedented contributory infringement claim necessarily entails consideration of arguments and case law which may also be forwarded under the other labels, and indeed the parties to a large extent rely upon such arguments and authority in support of their respective positions on the issue of contributory infringement.

> tion of the story. That was the most conspicuous purpose for which they could be used, and the one for which especially they were made. If the defendant did not contribute to the infringement it is impossible to do so except by taking part in the final act. It is liable on principles recognized in every part of the law." *Id.*, at 62–63.

The use for which the item sold in *Kalem* had been "especially" made was, of course, to display the performance that had already been recorded upon it. The producer had personally appropriated the copyright owner's protected work and, as the owner of the tangible medium of expression upon which the protected work was recorded, authorized that use by his sale of the film to jobbers. But that use of the film was not his to authorize: the copyright owner possessed the exclusive right to authorize public performances of his work. Further, the producer personally advertised the unauthorized public performances, dispelling any possible doubt as to the use of the film which he had authorized.

Respondents argue that *Kalem* stands for the proposition that supplying the "means" to accomplish an infringing activity and encouraging that activity through advertisement are sufficient to establish liability for copyright infringement. This argument rests on a gross generalization that cannot withstand scrutiny. The producer in *Kalem* did not merely provide the "means" to accomplish an infringing activity; the producer supplied the work itself, albeit in a new medium of expression. Sony in the instant case does not supply Betamax consumers with respondents' works; respondents do. Sony supplies a piece of equipment that is generally capable of copying the entire range of programs that may be televised: those that are uncopyrighted, those that are copyrighted but may be copied without objection from the copyright holder, and those that the copyright holder would prefer not to have copied. The Betamax can be used to make authorized or unauthorized uses of copyrighted works, but the range of its potential use is much broader than the particular infringing use of the film Ben Hur involved in *Kalem*. *Kalem* does not support respondents' novel theory of liability.

Justice Holmes stated that the producer had "contributed" to the infringement of the copyright, and the label "contributory infringement" has been applied in a number of lower court copyright cases involving an ongoing relationship between the direct infringer and the contributory infringer at the time the infringing conduct occurred. In such cases, as in other situations in which the imposition of vicarious liability is manifestly just, the "contributory" infringer was in a position to control the use of copyrighted works by others and had authorized the use without permission from the copyright owner.[18] This case, however, plainly does not fall

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[18] The so-called "dance hall cases," *Famous Music Corp.* v. *Bay State Harness Horse Racing & Breeding Assn., Inc.*, 554 F. 2d 1213 (CA1 1977) (racetrack retained infringer to supply music to paying customers); *KECA Music, Inc.* v. *Dingus McGee's Co.*, 432 F. Supp. 72 (WD Mo. 1977) (cocktail lounge hired musicians to supply music to paying customers); *Dreamland Ball Room, Inc.* v. *Shapiro, Bernstein & Co.*, 36 F. 2d 354 (CA7 1929) (dance hall hired orchestra to supply music to paying customers), are often contrasted with the so-called landlord-tenant cases, in which landlords who leased premises to a direct infringer for a fixed rental and did not participate directly in any infringing activity were found not to be liable for contributory infringement. *E. g., Deutsch* v. *Arnold*, 98 F. 2d 686 (CA2 1938).

In *Shapiro, Bernstein & Co.* v. *H. L. Green Co.*, 316 F. 2d 304 (CA2 1963), the owner of 23 chainstores retained the direct infringer to run its record departments. The relationship was structured as a licensing arrangement, so that the defendant bore none of the business risk of running the department. Instead, it received 10% or 12% of the direct infringer's gross receipts. The Court of Appeals concluded:

"[The dance-hall cases] and this one lie closer on the spectrum to the employer-employee model, than to the landlord-tenant model. . . . [O]n the particular facts before us, . . . Green's relationship to its infringing licensee, as well as its strong concern for the financial success of the phonoin that category. The only contact between Sony and the users of the Betamax that is disclosed by this record occurred at the moment of sale. The District Court expressly found that "no employee of Sony, Sonam or DDBI had either direct involvement with the allegedly infringing activity or direct contact with purchasers of Betamax who recorded copyrighted works off-the-air." 480 F. Supp., at 460. And it further found that "there was no evidence that any of the copies made by Griffiths or the other individual witnesses in this suit were influenced or encouraged by [Sony's] advertisements." *Ibid.*

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graph record concession, renders it liable for the unauthorized sales of the 'bootleg' records.

. . . . .

". . . [T]he imposition of *vicarious* liability in the case before us cannot be deemed unduly harsh or unfair. Green has the power to police carefully the conduct of its concessionaire . . .; our judgment will simply encourage it to do so, thus placing responsibility where it can and should be effectively exercised." *Id.*, at 308 (emphasis in original).

In *Gershwin Publishing Corp.* v. *Columbia Artists Management, Inc.*, 443 F. 2d 1159 (CA2 1971), the direct infringers retained the contributory infringer to manage their performances. The contributory infringer would contact each direct infringer, obtain the titles of the musical compositions to be performed, print the programs, and then sell the programs to its own local organizations for distribution at the time of the direct infringement. *Id.*, at 1161. The Court of Appeals emphasized that the contributory infringer had actual knowledge that the artists it was managing were performing copyrighted works, was in a position to police the infringing conduct of the artists, and derived substantial benefit from the actions of the primary infringers. *Id.*, at 1163.

In *Screen Gems-Columbia Music, Inc.* v. *Mark-Fi Records, Inc.*, 256 F. Supp. 399 (SDNY 1966), the direct infringer manufactured and sold bootleg records. In denying a motion for summary judgment, the District Court held that the infringer's advertising agency, the radio stations that advertised the infringer's works, and the service agency that boxed and mailed the infringing goods could all be held liable, if at trial it could be demonstrated that they knew or should have known that they were dealing in illegal goods.

If vicarious liability is to be imposed on Sony in this case, it must rest on the fact that it has sold equipment with constructive knowledge of the fact that its customers may use that equipment to make unauthorized copies of copyrighted material. There is no precedent in the law of copyright for the imposition of vicarious liability on such a theory. The closest analogy is provided by the patent law cases to which it is appropriate to refer because of the historic kinship between patent law and copyright law.[19]

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[19] *E. g., United States* v. *Paramount Pictures, Inc.*, 334 U. S., at 158; *Fox Film Corp.* v. *Doyal*, 286 U. S., at 131; *Wheaton* v. *Peters*, 8 Pet. 591, 657–658 (1834). The two areas of the law, naturally, are not identical twins, and we exercise the caution which we have expressed in the past in applying doctrine formulated in one area to the other. See generally *Mazer* v. *Stein*, 347 U. S. 201, 217–218 (1954); *Bobbs-Merrill Co.* v. *Straus*, 210 U. S., at 345.

We have consistently rejected the proposition that a similar kinship exists between copyright law and trademark law, and in the process of doing so have recognized the basic similarities between copyrights and patents. *The Trade-Mark Cases*, 100 U. S. 82, 91–92 (1879); see also *United Drug Co.* v. *Theodore Rectanus Co.*, 248 U. S. 90, 97 (1918) (trademark right "has little or no analogy" to copyright or patent); *McLean* v. *Fleming*, 96 U. S. 245, 254 (1878); *Canal Co.* v. *Clark*, 13 Wall. 311, 322 (1872). Given the fundamental differences between copyright law and trademark law, in this copyright case we do not look to the standard for contributory infringement set forth in *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U. S. 844, 854–855 (1982), which was crafted for application in trademark cases. There we observed that a manufacturer or distributor could be held liable to the owner of a trademark if it intentionally induced a merchant down the chain of distribution to pass off its product as that of the trademark owner's or if it continued to supply a product which could readily be passed off to a particular merchant whom it knew was mislabeling the product with the trademark owner's mark. If *Inwood*'s narrow standard for contributory trademark infringement governed here, respondents' claim of contributory infringement would merit little discussion. Sony certainly does not "intentionally induc[e]" its customers to make infringing uses of respondents' copyrights, nor does it supply its products to identified individuals known by it to be engaging in continuing infringement of respondents' copyrights, see *id.*, at 855.

In the Patent Act both the concept of infringement and the concept of contributory infringement are expressly defined by statute.[20] The prohibition against contributory infringement is confined to the knowing sale of a component especially made for use in connection with a particular patent. There is no suggestion in the statute that one patentee may object to the sale of a product that might be used in connection with other patents. Moreover, the Act expressly provides that the sale of a "staple article or commodity of commerce suitable for substantial noninfringing use" is not contributory infringement. 35 U. S. C. §271(c).

When a charge of contributory infringement is predicated entirely on the sale of an article of commerce that is used by the purchaser to infringe a patent, the public interest in access to that article of commerce is necessarily implicated. A finding of contributory infringement does not, of course, remove the article from the market altogether; it does, however, give the patentee effective control over the sale of that item. Indeed, a finding of contributory infringement is normally the functional equivalent of holding that the disputed article is within the monopoly granted to the patentee.[21]

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[20] Title 35 U. S. C. §271 provides:

"(a) Except as otherwise provided in this title, whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent.

"(b) Whoever actively induces infringement of a patent shall be liable as an infringer.

"(c) Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.

"(d) No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: (1) derived revenue from acts which if performed by another without his consent would constitute contributory infringement of the patent; (2) licensed or authorized another to perform acts which if performed without his consent would constitute contributory infringement of the patent; (3) sought to enforce his patent rights against infringement or contributory infringement."

For that reason, in contributory infringement cases arising under the patent laws the Court has always recognized the critical importance of not allowing the patentee to extend his monopoly beyond the limits of his specific grant. These cases deny the patentee any right to control the distribution of unpatented articles unless they are "unsuited for any commercial noninfringing use." *Dawson Chemical Co.* v. *Rohm & Hass Co.*, 448 U. S. 176, 198 (1980). Unless a commodity "has no use except through practice of the patented method," *id.*, at 199, the patentee has no right to claim that its distribution constitutes contributory infringement. "To form the basis for contributory infringement the item must almost be uniquely suited as a component of the patented invention." P. Rosenberg, Patent Law Fundamentals § 17.02[2] (2d ed. 1982). "[A] sale of an article which though adapted to an infringing use is also adapted to other and lawful uses, is not enough to make the seller a contributory infringer. Such a rule would block the wheels of commerce." *Henry* v. *A. B. Dick Co.*, 224 U. S. 1, 48 (1912), overruled on other grounds,

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[21] It seems extraordinary to suggest that the Copyright Act confers upon all copyright owners collectively, much less the two respondents in this case, the exclusive right to distribute VTR's simply because they may be used to infringe copyrights. That, however, is the logical implication of their claim. The request for an injunction below indicates that respondents seek, in effect, to declare VTR's contraband. Their suggestion in this Court that a continuing royalty pursuant to a judicially created compulsory license would be an acceptable remedy merely indicates that respondents, for their part, would be willing to license their claimed monopoly interest in VTR's to Sony in return for a royalty.

Motion Picture Patents Co. v. *Universal Film Mfg. Co.*, 243 U. S. 502, 517 (1917).

We recognize there are substantial differences between the patent and copyright laws. But in both areas the contributory infringement doctrine is grounded on the recognition that adequate protection of a monopoly may require the courts to look beyond actual duplication of a device or publication to the products or activities that make such duplication possible. The staple article of commerce doctrine must strike a balance between a copyright holder's legitimate demand for effective—not merely symbolic—protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce. Accordingly, the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.

IV

The question is thus whether the Betamax is capable of commercially significant noninfringing uses. In order to resolve that question, we need not explore *all* the different potential uses of the machine and determine whether or not they would constitute infringement. Rather, we need only consider whether on the basis of the facts as found by the District Court a significant number of them would be noninfringing. Moreover, in order to resolve this case we need not give precise content to the question of how much use is commercially significant. For one potential use of the Betamax plainly satisfies this standard, however it is understood: private, noncommercial time-shifting in the home. It does so both (A) because respondents have no right to prevent other copyright holders from authorizing it for their programs, and (B) because the District Court's factual findings reveal that even the unauthorized home time-shifting of respondents' programs is legitimate fair use.

A. *Authorized Time-Shifting*

Each of the respondents owns a large inventory of valuable copyrights, but in the total spectrum of television programming their combined market share is small. The exact percentage is not specified, but it is well below 10%.[22] If they were to prevail, the outcome of this litigation would have a significant impact on both the producers and the viewers of the remaining 90% of the programming in the Nation. No doubt, many other producers share respondents' concern about the possible consequences of unrestricted copying. Nevertheless the findings of the District Court make it clear that time-shifting may enlarge the total viewing audience and that many producers are willing to allow private time-shifting to continue, at least for an experimental time period.[23]

The District Court found:

> "Even if it were deemed that home-use recording of copyrighted material constituted infringement, the Betamax could still legally be used to record noncopyrighted material or material whose owners consented to the copying. An injunction would deprive the public of the ability to use the Betamax for this noninfringing off-the-air recording.

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[22] The record suggests that Disney's programs at the time of trial consisted of approximately one hour a week of network television and one syndicated series. Universal's percentage in the Los Angeles market on commercial television stations was under 5%. See Tr. 532–533, 549–550.

[23] The District Court did not make any explicit findings with regard to how much broadcasting is wholly uncopyrighted. The record does include testimony that at least one movie—My Man Godfrey—falls within that category, *id.*, at 2300–2301, and certain broadcasts produced by the Federal Government are also uncopyrighted. See 17 U. S. C. § 105 (1982 ed.). Cf. *Schnapper* v. *Foley*, 215 U. S. App. D. C. 59, 667 F. 2d 102 (1981) (explaining distinction between work produced by the Government and work commissioned by the Government). To the extent such broadcasting is now significant, it further bolsters our conclusion. Moreover, since copyright protection is not perpetual, the number of audiovisual works in the public domain necessarily increases each year.

> "Defendants introduced considerable testimony at trial about the potential for such copying of sports, religious, educational and other programming. This included testimony from representatives of the Offices of the Commissioners of the National Football, Basketball, Baseball and Hockey Leagues and Associations, the Executive Director of National Religious Broadcasters and various educational communications agencies. Plaintiffs attack the weight of the testimony offered and also contend that an injunction is warranted because infringing uses outweigh noninfringing uses.
>
> "Whatever the future percentage of legal versus illegal home-use recording might be, an injunction which seeks to deprive the public of the very tool or article of commerce capable of some noninfringing use would be an extremely harsh remedy, as well as one unprecedented in copyright law." 480 F. Supp., at 468.

Although the District Court made these statements in the context of considering the propriety of injunctive relief, the statements constitute a finding that the evidence concerning "sports, religious, educational and other programming" was sufficient to establish a significant quantity of broadcasting whose copying is now authorized, and a significant potential for future authorized copying. That finding is amply supported by the record. In addition to the religious and sports officials identified explicitly by the District Court,[24] two items in the record deserve specific mention.

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[24] See Tr. 2447–2450 (Alexander Hadden, Major League Baseball); *id.*, at 2480, 2486–2487 (Jay Moyer, National Football League); *id.*, at 2515–2516 (David Stern, National Basketball Association); *id.*, at 2530–2534 (Gilbert Stein, National Hockey League); *id.*, at 2543–2552 (Thomas Hansen, National Collegiate Athletic Association); *id.*, at 2565–2572 (Benjamin Armstrong, National Religious Broadcasters). Those officials were authorized to be the official spokespersons for their respective institutions in this litigation. *Id.*, at 2432, 2479, 2509–2510, 2530, 2538, 2563. See Fed. Rule Civ. Proc. 30(b)(6).

First is the testimony of John Kenaston, the station manager of Channel 58, an educational station in Los Angeles affiliated with the Public Broadcasting Service. He explained and authenticated the station's published guide to its programs.[25] For each program, the guide tells whether unlimited home taping is authorized, home taping is authorized subject to certain restrictions (such as erasure within seven days), or home taping is not authorized at all. The Spring 1978 edition of the guide described 107 programs. Sixty-two of those programs or 58% authorize some home taping. Twenty-one of them or almost 20% authorize unrestricted home taping.[26]

Second is the testimony of Fred Rogers, president of the corporation that produces and owns the copyright on Mister Rogers' Neighborhood. The program is carried by more public television stations than any other program. Its audience numbers over 3,000,000 families a day. He testified that he had absolutely no objection to home taping for noncommercial use and expressed the opinion that it is a real service to families to be able to record children's programs and to show them at appropriate times.[27]

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[25] Tr. 2863–2902; Defendants' Exh. PI.

[26] See also Tr. 2833–2844 (similar testimony by executive director of New Jersey Public Broadcasting Authority). Cf. *id.*, at 2592–2605 (testimony by chief of New York Education Department's Bureau of Mass Communications approving home taping for educational purposes).

[27] "Some public stations, as well as commercial stations, program the 'Neighborhood' at hours when some children cannot use it. I think that it's a real service to families to be able to record such programs and show them at appropriate times. I have always felt that with the advent of all of this new technology that allows people to tape the 'Neighborhood' off-the-air, and I'm speaking for the 'Neighborhood' because that's what I produce, that they then become much more active in the programming of their family's television life. Very frankly, I am opposed to people being programmed by others. My whole approach in broadcasting has always been 'You are an important person just the way you are. You can make healthy decisions.' Maybe I'm going on too long, but I just feel that anything that allows a person to be more active in the control of his or her life,

If there are millions of owners of VTR's who make copies of televised sports events, religious broadcasts, and educational programs such as Mister Rogers' Neighborhood, and if the proprietors of those programs welcome the practice, the business of supplying the equipment that makes such copying feasible should not be stifled simply because the equipment is used by some individuals to make unauthorized reproductions of respondents' works. The respondents do not represent a class composed of all copyright holders. Yet a finding of contributory infringement would inevitably frustrate the interests of broadcasters in reaching the portion of their audience that is available only through time-shifting.

Of course, the fact that other copyright holders may welcome the practice of time-shifting does not mean that respondents should be deemed to have granted a license to copy their programs. Third-party conduct would be wholly irrelevant in an action for direct infringement of respondents' copyrights. But in an action for *contributory* infringement against the seller of copying equipment, the copyright holder may not prevail unless the relief that he seeks affects only his programs, or unless he speaks for virtually all copyright holders with an interest in the outcome. In this case, the record makes it perfectly clear that there are many important producers of national and local television programs who find nothing objectionable about the enlargement in the size of the television audience that results from the practice of time-shifting for private home use.[28] The seller of the equipment that expands those producers' audiences cannot be a con-

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in a healthy way, is important." *Id.*, at 2920–2921. See also Defendants' Exh. PI, p. 85.

[28] It may be rare for large numbers of copyright owners to authorize duplication of their works without demanding a fee from the copier. In the context of public broadcasting, however, the user of the copyrighted work is not required to pay a fee for access to the underlying work. The traditional method by which copyright owners capitalize upon the television medium—commercially sponsored free public broadcast over the public airwaves—is predicated upon the assumption that compensation for

tributory infringer if, as is true in this case, it has had no direct involvement with any infringing activity.

B. *Unauthorized Time-Shifting*

Even unauthorized uses of a copyrighted work are not necessarily infringing. An unlicensed use of the copyright is not an infringement unless it conflicts with one of the specific exclusive rights conferred by the copyright statute. *Twentieth Century Music Corp.* v. *Aiken*, 422 U. S., at 154–155. Moreover, the definition of exclusive rights in § 106 of the present Act is prefaced by the words "subject to sections 107 through 118." Those sections describe a variety of uses of copyrighted material that "are not infringements of copyright" "notwithstanding the provisions of section 106." The most pertinent in this case is § 107, the legislative endorsement of the doctrine of "fair use."[29]

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the value of displaying the works will be received in the form of advertising revenues.

In the context of television programming, some producers evidently believe that permitting home viewers to make copies of their works off the air actually enhances the value of their copyrights. Irrespective of their reasons for authorizing the practice, they do so, and in significant enough numbers to create a substantial market for a noninfringing use of the Sony VTR's. No one could dispute the legitimacy of that market if the producers had authorized home taping of their programs in exchange for a license fee paid directly by the home user. The legitimacy of that market is not compromised simply because these producers have authorized home taping of their programs without demanding a fee from the home user. The copyright law does not require a copyright owner to charge a fee for the use of his works, and as this record clearly demonstrates, the owner of a copyright may well have economic or noneconomic reasons for permitting certain kinds of copying to occur without receiving direct compensation from the copier. It is not the role of the courts to tell copyright holders the best way for them to exploit their copyrights: even if respondents' competitors were ill-advised in authorizing home videotaping, that would not change the fact that they have created a substantial market for a paradigmatic noninfringing use of Sony's product.

[29] The Copyright Act of 1909, 35 Stat. 1075, did not have a "fair use" provision. Although that Act's compendium of exclusive rights "to print,

That section identifies various factors[30] that enable a court to apply an "equitable rule of reason" analysis to particular claims of infringement.[31] Although not conclusive, the first

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reprint, publish, copy, and vend the copyrighted work" was broad enough to encompass virtually all potential interactions with a copyrighted work, the statute was never so construed. The courts simply refused to read the statute literally in every situation. When Congress amended the statute in 1976, it indicated that it "intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H. R. Rep. No. 94–1476, p. 66 (1976).

[30] Section 107 provides:

"Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

"(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

"(2) the nature of the copyrighted work;

"(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

"(4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U. S. C. § 107 (1982 ed.).

[31] The House Report expressly stated that the fair use doctrine is an "equitable rule of reason" in its explanation of the fair use section:

"Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. . . .

. . . . .

"General intention behind the provision

"The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the factor requires that "the commercial or nonprofit character of an activity" be weighed in any fair use decision.[32] If the Betamax were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair. The contrary presumption is appropriate here, however, because the District Court's findings plainly establish that time-shifting for private home use must be characterized as a noncommercial, nonprofit activity. Moreover, when one considers the nature of a televised copyrighted audiovisual work, see 17 U. S. C. § 107(2) (1982 ed.), and that time-shifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact

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doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis." H. R. Rep. No. 94–1476, *supra*, at 65–66.

The Senate Committee similarly eschewed a rigid, bright-line approach to fair use. The Senate Report endorsed the view "that off-the-air recording for convenience" could be considered "fair use" under some circumstances, although it then made it clear that it did not intend to suggest that off-the-air recording for convenience should be deemed fair use under any circumstances imaginable. S. Rep. No. 94–473, pp. 65–66 (1975). The latter qualifying statement is quoted by the dissent, *post*, at 481, and if read in isolation, would indicate that the Committee intended to condemn all off-the-air recording for convenience. Read in context, however, it is quite clear that that was the farthest thing from the Committee's intention.

[32] "The Committee has amended the first of the criteria to be considered—'the purpose and character of the use'—to state explicitly that this factor includes a consideration of 'whether such use is of a commercial nature or is for non-profit educational purposes.' This amendment is not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works. It is an express recognition that, as under the present law, the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions." H. R. Rep. No. 94–1476, *supra*, at 66.

that the entire work is reproduced, see § 107(3), does not have its ordinary effect of militating against a finding of fair use.[33]

This is not, however, the end of the inquiry because Congress has also directed us to consider "the effect of the use upon the potential market for or value of the copyrighted work." § 107(4). The purpose of copyright is to create incentives for creative effort. Even copying for noncommercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended him to have. But a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create. The prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit.[34]

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[33] It has been suggested that "consumptive uses of copyrights by home VTR users are commercial even if the consumer does not sell the home-made tape because the consumer will not buy tapes separately sold by the copyrightholder." Home Recording of Copyrighted Works: Hearing before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 97th Cong., 2d Sess., pt. 2, p. 1250 (1982) (memorandum of Prof. Laurence H. Tribe). Furthermore, "[t]he error in excusing such theft as noncommercial," we are told, "can be seen by simple analogy: jewel theft is not converted into a noncommercial veniality if stolen jewels are simply worn rather than sold." *Ibid.* The premise and the analogy are indeed simple, but they add nothing to the argument. The use to which stolen jewelry is put is quite irrelevant in determining whether depriving its true owner of his present possessory interest in it is venial; because of the nature of the item and the true owner's interests in physical possession of it, the law finds the taking objectionable even if the thief does not use the item at all. Theft of a particular item of personal property of course may have commercial significance, for the thief deprives the owner of his right to sell that particular item to any individual. Time-shifting does not even remotely entail comparable consequences to the copyright owner. Moreover, the time-shifter no more steals the program by watching it once than does the live viewer, and the live viewer is no more likely to buy prerecorded videotapes than is the time-shifter. Indeed, no live viewer would buy a prerecorded videotape if he did not have access to a VTR.

Thus, although every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter. A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.

In this case, respondents failed to carry their burden with regard to home time-shifting. The District Court described respondents' evidence as follows:

> "Plaintiffs' experts admitted at several points in the trial that the time-shifting without librarying would result in 'not a great deal of harm.' Plaintiffs' greatest concern about time-shifting is with 'a point of important philosophy that transcends even commercial judgment.' They fear that with any Betamax usage, 'invisible boundaries' are passed: 'the copyright owner has lost control over his program.'" 480 F. Supp., at 467.

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[34] Cf. A. Latman, Fair Use of Copyrighted Works (1958), reprinted in Study No. 14 for the Senate Committee on the Judiciary, Copyright Law Revision, Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights, 86th Cong., 2d Sess., 30 (1960):

"In certain situations, the copyright owner suffers no substantial harm from the use of his work. . . . Here again, is the partial marriage between the doctrine of fair use and the legal maxim *de minimus non curat lex*."

Later in its opinion, the District Court observed:

> "Most of plaintiffs' predictions of harm hinge on speculation about audience viewing patterns and ratings, a measurement system which Sidney Sheinberg, MCA's president, calls a 'black art' because of the significant level of imprecision involved in the calculations." *Id.*, at 469.[35]

There was no need for the District Court to say much about past harm. "Plaintiffs have admitted that no actual harm to their copyrights has occurred to date." *Id.*, at 451.

On the question of potential future harm from time-shifting, the District Court offered a more detailed analysis of the evidence. It rejected respondents' "fear that persons 'watching' the original telecast of a program will not be measured in the live audience and the ratings and revenues will decrease," by observing that current measurement technology allows the Betamax audience to be reflected. *Id.*, at 466.[36] It rejected respondents' prediction "that live televi-

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[35] See also 480 F. Supp., at 451:

"It should be noted, however, that plaintiffs' argument is more complicated and speculative than was the plaintiff's in *Williams & Wilkins*. . . . Here, plaintiffs ask the court to find harm based on many more assumptions. . . . As is discussed more fully in Part IV *infra*, some of these assumptions are based on neither fact nor experience, and plaintiffs admit that they are to some extent inconsistent and illogical."

[36] "There was testimony at trial, however, that Nielsen Ratings has already developed the ability to measure when a Betamax in a sample home is recording the program. Thus, the Betamax owner will be measured as a part of the live audience. The later diary can augment that measurement with information about subsequent viewing." *Id.*, at 466.

In a separate section, the District Court rejected plaintiffs' suggestion that the commercial attractiveness of television broadcasts would be diminished because Betamax owners would use the pause button or fast-forward control to avoid viewing advertisements:

"It must be remembered, however, that to omit commercials, Betamax owners must view the program, including the commercials, while recording. To avoid commercials during playback, the viewer must fast-forward sion or movie audiences will decrease as more people watch Betamax tapes as an alternative," with the observation that "[t]here is no factual basis for [the underlying] assumption." *Ibid.*[37] It rejected respondents' "fear that time-shifting will reduce audiences for telecast reruns," and concluded instead that "given current market practices, this should aid plaintiffs rather than harm them." *Ibid.*[38] And it declared that respondents' suggestion that "theater or film rental exhibition of a program will suffer because of time-shift recording of that program" "lacks merit." *Id.*, at 467.[39]

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and, for the most part, guess as to when the commercial has passed. For most recordings, either practice may be too tedious. As defendants' survey showed, 92% of the programs were recorded with commercials and only 25% of the owners fast-forward through them. Advertisers will have to make the same kinds of judgments they do now about whether persons viewing televised programs actually watch the advertisements which interrupt them." *Id.*, at 468.

[37] "Here plaintiffs assume that people will view copies when they would otherwise be watching television or going to the movie theater. There is no factual basis for this assumption. It seems equally likely that Betamax owners will play their tapes when there is nothing on television they wish to see and no movie they want to attend. Defendants' survey does not show any negative effect of Betamax ownership on television viewing or theater attendance." *Id.*, at 466.

[38] "The underlying assumptions here are particularly difficult to accept. Plaintiffs explain that the Betamax increases access to the original televised material and that the more people there are in this original audience, the fewer people the rerun will attract. Yet current marketing practices, including the success of syndication, show just the opposite. Today, the larger the audience for the original telecast, the higher the price plaintiffs can demand from broadcasters from rerun rights. There is no survey within the knowledge of this court to show that the rerun audience is comprised of persons who have not seen the program. In any event, if ratings can reflect Betamax recording, original audiences may increase and, given market practices, this should aid plaintiffs rather than harm them." *Ibid.*

[39] "This suggestion lacks merit. By definition, time-shift recording entails viewing and erasing, so the program will no longer be on tape when the later theater run begins. Of course, plaintiffs may fear that the Betamax owners will keep the tapes long enough to satisfy all their interest in

After completing that review, the District Court restated its overall conclusion several times, in several different ways. "Harm from time-shifting is speculative and, at best, minimal." *Ibid.* "The audience benefits from the time-shifting capability have already been discussed. It is not implausible that benefits could also accrue to plaintiffs, broadcasters, and advertisers, as the Betamax makes it possible for more persons to view their broadcasts." *Ibid.* "No likelihood of harm was shown at trial, and plaintiffs admitted that there had been no actual harm to date." *Id.*, at 468–469. "Testimony at trial suggested that Betamax may require adjustments in marketing strategy, but it did not establish even a likelihood of harm." *Id.*, at 469. "Television production by plaintiffs today is more profitable than it has ever been, and, in five weeks of trial, there was no concrete evidence to suggest that the Betamax will change the studios' financial picture." *Ibid.*

The District Court's conclusions are buttressed by the fact that to the extent time-shifting expands public access to freely broadcast television programs, it yields societal benefits. In *Community Television of Southern California* v. *Gottfried*, 459 U. S. 498, 508, n. 12 (1983), we acknowledged the public interest in making television broadcasting more available. Concededly, that interest is not unlimited. But it supports an interpretation of the concept of "fair use" that requires the copyright holder to demonstrate some likelihood of harm before he may condemn a private act of time-shifting as a violation of federal law.

When these factors are all weighed in the "equitable rule of reason" balance, we must conclude that this record amply

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the program and will, therefore, not patronize later theater exhibitions. To the extent that this practice involves librarying, it is addressed in section V. C., *infra*. It should also be noted that there is no evidence to suggest that the public interest in later theatrical exhibitions of motion pictures will be reduced any more by Betamax recording than it already is by the television broadcast of the film." *Id.*, at 467.

supports the District Court's conclusion that home time-shifting is fair use. In light of the findings of the District Court regarding the state of the empirical data, it is clear that the Court of Appeals erred in holding that the statute as presently written bars such conduct.[40]

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[40] The Court of Appeals chose not to engage in any "equitable rule of reason" analysis in this case. Instead, it assumed that the category of "fair use" is rigidly circumscribed by a requirement that every such use must be "productive." It therefore concluded that copying a television program merely to enable the viewer to receive information or entertainment that he would otherwise miss because of a personal scheduling conflict could never be fair use. That understanding of "fair use" was erroneous.

Congress has plainly instructed us that fair use analysis calls for a sensitive balancing of interests. The distinction between "productive" and "unproductive" uses may be helpful in calibrating the balance, but it cannot be wholly determinative. Although copying to promote a scholarly endeavor certainly has a stronger claim to fair use than copying to avoid interrupting a poker game, the question is not simply two-dimensional. For one thing, it is not true that all copyrights are fungible. Some copyrights govern material with broad potential secondary markets. Such material may well have a broader claim to protection because of the greater potential for commercial harm. Copying a news broadcast may have a stronger claim to fair use than copying a motion picture. And, of course, not all uses are fungible. Copying for commercial gain has a much weaker claim to fair use than copying for personal enrichment. But the notion of social "productivity" cannot be a complete answer to this analysis. A teacher who copies to prepare lecture notes is clearly productive. But so is a teacher who copies for the sake of broadening his personal understanding of his specialty. Or a legislator who copies for the sake of broadening her understanding of what her constituents are watching; or a constituent who copies a news program to help make a decision on how to vote.

Making a copy of a copyrighted work for the convenience of a blind person is expressly identified by the House Committee Report as an example of fair use, with no suggestion that anything more than a purpose to entertain or to inform need motivate the copying. In a hospital setting, using a VTR to enable a patient to see programs he would otherwise miss has no productive purpose other than contributing to the psychological well-being of the patient. Virtually any time-shifting that increases viewer access to television programming may result in a comparable benefit. The statutory language does not identify any dichotomy between productive and

In summary, the record and findings of the District Court lead us to two conclusions. First, Sony demonstrated a significant likelihood that substantial numbers of copyright holders who license their works for broadcast on free television would not object to having their broadcasts time-shifted by private viewers. And second, respondents failed to demonstrate that time-shifting would cause any likelihood of non-minimal harm to the potential market for, or the value of, their copyrighted works. The Betamax is, therefore, capable of substantial noninfringing uses. Sony's sale of such equipment to the general public does not constitute contributory infringement of respondents' copyrights.

V

> "The direction of Art. I is that *Congress* shall have the power to promote the progress of science and the useful arts. When, as here, the Constitution is permissive, the sign of how far Congress has chosen to go can come only from Congress." *Deepsouth Packing Co.* v. *Laitram Corp.*, 406 U. S. 518, 530 (1972).

One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible.

It may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past. But it is not our job to apply laws that have not yet been written. Applying the copyright statute, as it now reads, to the facts as they have been developed in this case, the judgment of the Court of Appeals must be reversed.

It is so ordered.

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nonproductive time-shifting, but does require consideration of the economic consequences of copying.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL, JUSTICE POWELL, and JUSTICE REHNQUIST join, dissenting.

A restatement of the facts and judicial history of this case is necessary, in my view, for a proper focus upon the issues. Respondents' position is hardly so "unprecedented," *ante*, at 421, in the copyright law, nor does it really embody a "gross generalization," *ante*, at 436, or a "novel theory of liability," *ante*, at 437, and the like, as the Court, in belittling their claims, describes the efforts of respondents.

I

The introduction of the home videotape recorder (VTR) upon the market has enabled millions of Americans to make recordings of television programs in their homes, for future and repeated viewing at their own convenience. While this practice has proved highly popular with owners of television sets and VTR's, it understandably has been a matter of concern for the holders of copyrights in the recorded programs. A result is the present litigation, raising the issues whether the home recording of a copyrighted television program is an infringement of the copyright, and, if so, whether the manufacturers and distributors of VTR's are liable as contributory infringers. I would hope that these questions ultimately will be considered seriously and in depth by the Congress and be resolved there, despite the fact that the Court's decision today provides little incentive for congressional action. Our task in the meantime, however, is to resolve these issues as best we can in the light of ill-fitting existing copyright law.

It is no answer, of course, to refer to and stress, as the Court does, this Court's "consistent deference to Congress" whenever "major technological innovations" appear. *Ante*, at 431. Perhaps a better and more accurate description is that the Court has tended to evade the hard issues when they arise in the area of copyright law. I see no reason for the Court to be particularly pleased with this tradition or to continue it. Indeed, it is fairly clear from the legislative history of the 1976 Act that Congress meant to change the old pattern and enact a statute that would cover new technologies, as well as old.

II

In 1976, respondents Universal City Studios, Inc., and Walt Disney Productions (Studios) brought this copyright infringement action in the United States District Court for the Central District of California against, among others, petitioners Sony Corporation, a Japanese corporation, and Sony Corporation of America, a New York corporation, the manufacturer and distributor, respectively, of the Betamax VTR. The Studios sought damages, profits, and a wide-ranging injunction against further sales or use of the Betamax or Betamax tapes.

The Betamax, like other VTR's, presently is capable of recording television broadcasts off the air on videotape cassettes, and playing them back at a later time.[1] *Two* kinds of Betamax usage are at issue here.[2] The first is "time-shifting," whereby the user records a program in order to watch it at a later time, and then records over it, and thereby erases the program, after a single viewing. The second is "library-building," in which the user records a program in order to keep it for repeated viewing over a longer term. Sony's advertisements, at various times, have suggested that Betamax users "record favorite shows" or "build a library." Sony's Betamax advertising has never contained warnings about copyright infringement, although a warning does appear in the Betamax operating instructions.

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[1] The Betamax has three primary components: a tuner that receives television ("RF") signals broadcast over the airwaves; an adapter that converts the RF signals into audio-video signals; and a recorder that places the audio-video signals on magnetic tape. Sony also manufactures VTR's without built-in tuners; these are capable of playing back prerecorded tapes and recording home movies on videotape, but cannot record off the air. Since the Betamax has its own tuner, it can be used to record off one channel while another channel is being watched.

The Betamax is available with auxiliary features, including a timer, a pause control, and a fast-forward control; these allow Betamax owners to record programs without being present, to avoid (if they are present) recording commercial messages, and to skip over commercials while playing back the recording. Videotape is reusable; the user erases its record by recording over it.

[2] This case involves only the home recording for home use of television programs broadcast free over the airwaves. No issue is raised concerning cable or pay television, or the sharing or trading of tapes.

The Studios produce copyrighted "movies" and other works that they release to theaters and license for television broadcast. They also rent and sell their works on film and on prerecorded videotapes and videodiscs. License fees for television broadcasts are set according to audience ratings, compiled by rating services that do not measure any playbacks of videotapes. The Studios make the serious claim that VTR recording may result in a decrease in their revenue from licensing their works to television and from marketing them in other ways.

After a 5-week trial, the District Court, with a detailed opinion, ruled that home VTR recording did not infringe the Studios' copyrights under either the Act of Mar. 4, 1909 (1909 Act), 35 Stat. 1075, as amended (formerly codified as 17 U. S. C. § 1 *et seq.*), or the Copyright Revision Act of 1976 (1976 Act), 90 Stat. 2541, 17 U. S. C. § 101 *et seq.* (1982 ed.).[3] The District Court also held that even if home VTR recording were an infringement, Sony could not be held liable under theories of direct infringement, contributory infringement, or vicarious liability. Finally, the court concluded that an injunction against sales of the Betamax would be inappropriate even if Sony were liable under one or more of those theories. 480 F. Supp. 429 (1979).

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[3] At the trial, the Studios proved 32 individual instances where their copyrighted works were recorded on Betamax VTR's. Two of these instances occurred after January 1, 1978, the primary effective date of the 1976 Act; all the others occurred while the 1909 Act was still effective. My analysis focuses primarily on the 1976 Act, but the principles governing copyright protection for these works are the same under either Act.

The United States Court of Appeals for the Ninth Circuit reversed in virtually every respect. 659 F. 2d 963 (1981). It held that the 1909 Act and the 1976 Act contained no implied exemption for "home use" recording, that such recording was not "fair use," and that the use of the Betamax to record the Studios' copyrighted works infringed their copyrights. The Court of Appeals also held Sony liable for contributory infringement, reasoning that Sony knew and anticipated that the Betamax would be used to record copyrighted material off the air, and that Sony, indeed, had induced, caused, or materially contributed to the infringing conduct. The Court of Appeals remanded the case to the District Court for appropriate relief; it suggested that the District Court could consider the award of damages or a continuing royalty in lieu of an injunction. *Id.*, at 976.

III

The Copyright Clause of the Constitution, Art. I, § 8, cl. 8, empowers Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." This Nation's initial copyright statute was passed by the First Congress. Entitled "An Act for the encouragement of learning," it gave an author "the sole right and liberty of printing, reprinting, publishing and vending" his "map, chart, book or books" for a period of 14 years. Act of May 31, 1790, § 1, 1 Stat. 124. Since then, as the technology available to authors for creating and preserving their writings has changed, the governing statute has changed with it. By many amendments, and by complete revisions in 1831, 1870, 1909, and 1976,[4] authors' rights have been expanded to provide protection to any "original works of authorship fixed in any tangible medium of expression," including "motion pictures and other audiovisual works." 17 U. S. C. § 102(a) (1982 ed.).[5]

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[4] Act of Feb. 3, 1831, ch. 16, 4 Stat. 436; Act of July 8, 1870, §§ 85–111, 16 Stat. 212–217; Act of Mar. 4, 1909, 35 Stat. 1075 (formerly codified as 17 U. S. C. § 1 *et seq.*); Copyright Revision Act of 1976, 90 Stat. 2541 (codified as 17 U. S. C. § 101 *et seq.* (1982 ed.)).

Section 106 of the 1976 Act grants the owner of a copyright a variety of exclusive rights in the copyrighted work,[6] includ-

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[5] Section 102(a) provides:

"Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

"(1) literary works;
"(2) musical works, including any accompanying words;
"(3) dramatic works, including any accompanying music;
"(4) pantomimes and choreographic works;
"(5) pictorial, graphic, and sculptural works;
"(6) motion pictures and other audiovisual works; and
"(7) sound recordings."

Definitions of terms used in § 102(a)(6) are provided by § 101: "Audiovisual works" are "works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied." And "motion pictures" are "audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any." Most commercial television programs, if fixed on film or tape at the time of broadcast or before, qualify as "audiovisual works." Since the categories set forth in § 102(a) are not mutually exclusive, a particular television program may also qualify for protection as a dramatic, musical, or other type of work.

[6] Section 106 provides:

"Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

"(1) to reproduce the copyrighted work in copies or phonorecords;

"(2) to prepare derivative works based upon the copyrighted work;

"(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

ing the right "to reproduce the copyrighted work in copies or phonorecords."[7] This grant expressly is made subject to §§ 107–118, which create a number of exemptions and limitations on the copyright owner's rights. The most important of these sections, for present purposes, is § 107; that section states that "the fair use of a copyrighted work . . . is not an infringement of copyright."[8]

The 1976 Act, like its predecessors,[9] does *not* give the copyright owner full and complete control over all possible

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"(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

"(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly."

[7] A "phonorecord" is defined by § 101 as a reproduction of sounds other than sounds accompanying an audiovisual work, while a "copy" is a reproduction of a work in any form other than a phonorecord.

[8] Section 107 provides:

"Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

"(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

"(2) the nature of the copyrighted work;

"(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

"(4) the effect of the use upon the potential market for or value of the copyrighted work."

Section 101 makes it clear that the four factors listed in this section are "illustrative and not limitative."

[9] The 1976 Act was the product of a revision effort lasting more than 20 years. Spurred by the recognition that "significant developments in technology and communications" had rendered the 1909 Act inadequate, S. Rep. No. 94–473, p. 47 (1975); see H. R. Rep. No. 94–1476, p. 47 (1976),

uses of his work. If the work is put to some use not enumerated in § 106, the use is not an infringement. See *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U. S. 390, 393–395 (1968). Thus, before considering whether home videotaping comes within the scope of the fair use exemption, one first must inquire whether the practice appears to violate the exclusive right, granted in the first instance by § 106(1), "to reproduce the copyrighted work in copies or phonorecords."

A

Although the word "copies" is in the plural in § 106(1), there can be no question that under the Act the making of even a single unauthorized copy is prohibited. The Senate and House Reports explain: "The references to 'copies or phonorecords,' although in the plural, are intended here and throughout the bill to include the singular (1 U. S. C. § 1)."[10]

Congress in 1955 authorized the Copyright Office to prepare a series of studies on all aspects of the existing copyright law. Thirty-four studies were prepared and presented to Congress. The Register of Copyrights drafted a comprehensive report with recommendations, House Committee on the Judiciary, Copyright Law Revision, Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law, 87th Cong., 1st Sess. (Comm. Print 1961) (Register's 1961 Report), and general revision bills were introduced near the end of the 88th Congress in 1964. H. R. 11947/S. 3008, 88th Cong., 2d Sess. (1964). The Register issued a second report in 1965, with revised recommendations. House Committee on the Judiciary, Copyright Law Revision, pt. 6, Supplementary Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess. (Comm. Print 1965) (Register's Supplementary Report). Action on copyright revision was delayed from 1967 to 1974 by a dispute on cable television, see generally Second Supplementary Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law: 1975 Revision Bill, ch. V, pp. 2–26 (Draft Oct.–Dec. 1975) (Register's Second Supplementary Report), but a compromise led to passage of the present Act in 1976.

[10] Title 1 U. S. C. § 1 provides in relevant part:

"In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . words importing the plural include the singular . . . ."

S. Rep. No. 94–473, p. 58 (1975) (1975 Senate Report); H. R. Rep. No. 94–1476, p. 61 (1976) (1976 House Report). The Reports then describe the reproduction right established by § 106(1):

> "[T]he right 'to reproduce the copyrighted work in copies or phonorecords' means the right to produce a material object in which the work is duplicated, transcribed, imitated, or simulated in a fixed form from which it can be 'perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.' As under the present law, a copyrighted work would be infringed by reproducing it in whole or in any substantial part, and by duplicating it exactly or by imitation or simulation." 1975 Senate Report 58; 1976 House Report 61.

The making of even a single videotape recording at home falls within this definition; the VTR user produces a material object from which the copyrighted work later can be perceived. Unless Congress intended a special exemption for the making of a single copy for personal use, I must conclude that VTR recording is contrary to the exclusive rights granted by § 106(1).

The 1976 Act and its accompanying Reports specify in some detail the situations in which a single copy of a copyrighted work may be made without infringement concerns. Section 108(a), for example, permits a library or archives "to reproduce no more than one copy or phonorecord of a work" for a patron, but only under very limited conditions; an entire work, moreover, can be copied only if it cannot be obtained elsewhere at a fair price.[11] § 108(e); see also § 112(a) (broadcaster may "make no more than one copy or phonorecord of a particular transmission program," and only under certain conditions). In other respects, the making of single copies is permissible only within the limited confines of the fair use doctrine. The Senate Report, in a section headed "Single and multiple copying," notes that the fair use doctrine would permit a teacher to make a single copy of a work for use in the classroom, but only if the work was not a "sizable" one such as a novel or treatise. 1975 Senate Report 63–64; accord, 1976 House Report 68–69, 71. Other situations in which the making of a single copy would be fair use are described in the House and Senate Reports.[12] But neither the statute nor its legislative history suggests any intent to create a general exemption for a single copy made for personal or private use.

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[11] The library photocopying provisions of § 108 do not excuse any person who requests "a copy" from a library if the requester's use exceeds fair use. § 108(f)(2). Moreover, a library is absolved from liability for the un-

Indeed, it appears that Congress considered and rejected the very possibility of a special private use exemption. The issue was raised early in the revision process, in one of the studies prepared for Congress under the supervision of the Copyright Office. A. Latman, Fair Use of Copyrighted Works (1958), reprinted in Study No. 14 for the Senate Committee on the Judiciary, Copyright Law Revision, Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights, 86th Cong., 2d Sess., 1 (1960) (Latman Fair Use Study). This study found no reported case supporting the existence of an exemption for private use, although it noted that "the purpose and nature of a private use, and in some

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supervised use of its copying equipment provided that the equipment bears a notice informing users that "the making of a copy" may violate the copyright law. § 108(f)(1).

[12] For example, "the making of a single copy or phonorecord by an individual as a free service for a blind person" would be a fair use, as would "a single copy reproduction of an excerpt from a copyrighted work by a calligrapher for a single client" or "a single reproduction of excerpts from a copyrighted work by a student calligrapher or teacher in a learning situation." 1975 Senate Report 66–67; see 1976 House Report 73–74. Application of

cases the small amount taken, might lead a court to apply the general principles of fair use in such a way as to deny liability." *Id.*, at 12. After reviewing a number of foreign copyright laws that contained explicit statutory exemptions for private or personal use, *id.*, at 25, Professor Latman outlined several approaches that a revision bill could take to the general issue of exemptions and fair use. One of these was the adoption of particularized rules to cover specific situations, including "the field of personal use." *Id.*, at 33.[13]

Rejecting the latter alternative, the Register of Copyrights recommended that the revised copyright statute simply mention the doctrine of fair use and indicate its general scope. The Register opposed the adoption of rules and exemptions to cover specific situations,[14] preferring, instead, to rely on the judge-made fair use doctrine to resolve new problems as they arose. See Register's 1961 Report 25; Register's Supplementary Report 27–28.

The Register's approach was reflected in the first copyright revision bills, drafted by the Copyright Office in 1964.

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the fair use doctrine in these situations, of course, would be unnecessary if the 1976 Act created a general exemption for the making of a single copy.

[13] Professor Latman made special mention of the "personal use" issue because the area was one that "has become disturbed by recent developments . . . . Photoduplication devices may make authors' and publishers' groups apprehensive. The Copyright Charter recently approved by [the International Confederation of Societies of Authors and Composers] emphasizes the concern of authors over 'private' uses which, because of technological developments, are said to be competing seriously with the author's economic interests." Latman Fair Use Study 33–34.

[14] The one exemption proposed by the Register, permitting a library to make a single photocopy of an out-of-print work and of excerpts that a requester certified were needed for research, met with opposition and was not included in the bills initially introduced in Congress. See Register's 1961 Report 26; H. R. 11947/S. 3008, 88th Cong., 2d Sess. (1964); Register's Supplementary Report 26. A library copying provision was restored to the bill in 1969, after pressure from library associations. Register's Second Supplementary Report, ch. III, pp. 10–11; see S. 543, 91st Cong., 1st Sess., § 108 (Comm. Print, Dec. 10, 1969); 1975 Senate Report 48.

These bills, like the 1976 Act, granted the copyright owner the exclusive right to reproduce the copyrighted work, subject only to the exceptions set out in later sections. H. R. 11947/S. 3008, 88th Cong., 2d Sess., § 5(a) (1964). The primary exception was fair use, § 6, containing language virtually identical to § 107 of the 1976 Act. Although the copyright revision bills underwent change in many respects from their first introduction in 1964 to their final passage in 1976, these portions of the bills did not change.[15] I can conclude only that Congress, like the Register, intended to rely on the fair use doctrine, and not on a *per se* exemption for private use, to separate permissible copying from the impermissible.[16]

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[15] The 1964 bills provided that the fair use of copyrighted material for purposes "such as criticism, comment, news reporting, teaching, scholarship, or research" was not an infringement of copyright, and listed four "factors to be considered" in determining whether any other particular use was fair. H. R. 11947/S. 3008, 88th Cong., 2d Sess., § 6 (1964). Revised bills, drafted by the Copyright Office in 1965, contained a fair use provision merely mentioning the doctrine but not indicating its scope: "Notwithstanding the provisions of section 106, the fair use of a copyrighted work is not an infringement of copyright." H. R. 4347/S. 1006, 89th Cong., 1st Sess., § 107 (1965). The House Judiciary Committee restored the provision to its earlier wording, H. R. Rep. No. 2237, 89th Cong., 2d Sess., 5, 58 (1966), and the language adopted by the Committee remained in the bill in later Congresses. See H. R. 2512/S. 597, 90th Cong., 1st Sess., § 107 (1967); S. 543, 91st Cong., 1st Sess., § 107 (1969); S. 644, 92d Cong., 1st Sess., § 107 (1971); S. 1361, 93d Cong., 1st Sess., § 107 (1973); H. R. 2223/S. 22, 94th Cong., 1st Sess., § 107 (1975). With a few additions by the House Judiciary Committee in 1976, see 1976 House Report 5; H. R. Conf. Rep. No. 94–1733, p. 70 (1976), the same language appears in § 107 of the 1976 Act.

[16] In *Williams & Wilkins Co.* v. *United States*, 203 Ct. Cl. 74, 487 F. 2d 1345 (1973), aff'd by an equally divided Court, 420 U. S. 376 (1975), decided during the process of the revision of the copyright statutes, the Court of Claims suggested that copying for personal use might be outside the scope of copyright protection under the 1909 Act. The court reasoned that because "hand copying" for personal use has always been regarded as permis-

When Congress intended special and protective treatment for private use, moreover, it said so explicitly. One such explicit statement appears in § 106 itself. The copyright owner's exclusive right to *perform* a copyrighted work, in contrast to his right to reproduce the work in copies, is limited. Section 106(4) grants a copyright owner the exclusive right to perform the work "publicly," but does not afford the owner protection with respect to private performances by others. A motion picture is "performed" whenever its images are shown or its sounds are made audible. § 101. Like "sing-

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sible, and because the practice of making personal copies continued after typewriters and photostat machines were developed, the making of personal copies by means other than hand copying should be permissible as well. 203 Ct. Cl., at 84–88, 487 F. 2d, at 1350–1352.

There appear to me to be several flaws in this reasoning. First, it is by no means clear that the making of a "hand copy" of an entire work is permissible; the most that can be said is that there is no reported case on the subject, possibly because no copyright owner ever thought it worthwhile to sue. See Latman Fair Use Study 11–12; 3 M. Nimmer, Copyright § 13.05[E][4][a] (1983). At least one early treatise asserted that infringement would result "if an individual made copies for his personal use, even in his own handwriting, as there is no rule of law excepting manuscript copies from the law of infringement." A. Weil, American Copyright Law § 1066 (1917). Second, hand copying or even copying by typewriter is self-limiting. The drudgery involved in making hand copies ordinarily ensures that only necessary and fairly small portions of a work are taken; it is unlikely that any user would make a hand copy as a substitute for one that could be purchased. The harm to the copyright owner from hand copying thus is minimal. The recent advent of inexpensive and readily available copying machines, however, has changed the dimensions of the problem. See Register's Second Supplementary Report, ch. III, p. 3; Hearings on H. R. 2223 before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 94th Cong., 1st Sess., 194 (1975) (1975 House Hearings) (remarks of Rep. Danielson); *id.*, at 234 (statement of Robert W. Cairns); *id.*, at 250 (remarks of Rep. Danielson); *id.*, at 354 (testimony of Irwin Karp); *id.*, at 467 (testimony of Rondo Cameron); *id.*, at 1795 (testimony of Barbara Ringer, Register of Copyrights). Thus, "[t]he supposition that there is no tort involved in a scholar copying a copyrighted text by hand does not much advance the question of machine copying." B. Kaplan, An Unhurried View of Copyright 101–102 (1967).

[ing] a copyrighted lyric in the shower," *Twentieth Century Music Corp.* v. *Aiken*, 422 U. S. 151, 155 (1975), watching television at home with one's family and friends is now considered a performance. 1975 Senate Report 59–60; 1976 House Report 63.[17] Home television viewing nevertheless does not infringe any copyright—but only because § 106(4) contains the word "publicly."[18] See generally 1975 Senate Report 60–61; 1976 House Report 63–64; Register's 1961 Report 29–30. No such distinction between public and private uses appears in § 106(1)'s prohibition on the making of copies.[19]

Similarly, an explicit reference to private use appears in § 108. Under that section, a library can make a copy for a patron only for specific types of private use: "private study, scholarship, or research."[20] §§ 108(d)(1) and (e)(1); see 37

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[17] In a trio of cases, *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U. S. 390, 398 (1968); *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, 415 U. S. 394, 403–405 (1974); and *Twentieth Century Music Corp.* v. *Aiken*, 422 U. S. 151 (1975), this Court had held that the reception of a radio or television broadcast was not a "performance" under the 1909 Act. The Court's "narrow construction" of the word "perform" was "completely overturned by the [1976 Act] and its broad definition of 'perform' in section 101." 1976 House Report 87.

[18] A work is performed "publicly" if it takes place "at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." § 101.

[19] One purpose of the exemption for private performances was to permit the home viewing of lawfully made videotapes. The Register noted in 1961 that "[n]ew technical devices will probably make it practical in the future to reproduce televised motion pictures in the home. We do not believe the private *use* of such a reproduction can or should be precluded by copyright." Register's 1961 Report 30 (emphasis added). The Register did not suggest that the private *making* of a reproduction of a televised motion picture would be permitted by the copyright law. The Register later reminded Congress that "[i]n general the concept of 'performance' must be distinguished sharply from the reproduction of copies." Register's Supplementary Report 22.

[20] During hearings on this provision, Representative Danielson inquired whether it would apply to works of fiction such as "Gone With the Wind," or whether it was limited to "strictly technical types of information." The

CFR § 201.14(b) (1983). Limits also are imposed on the extent of the copying and the type of institution that may make copies, and the exemption expressly is made inapplicable to motion pictures and certain other types of works. § 108(h). These limitations would be wholly superfluous if an entire copy of any work could be made by any person for private use.[21]

B

The District Court in this case nevertheless concluded that the 1976 Act contained an implied exemption for "home-use recording." 480 F. Supp., at 444–446. The court relied primarily on the legislative history of a 1971 amendment to the 1909 Act, a reliance that this Court today does not duplicate. *Ante*, at 430, n. 11. That amendment, however, was addressed to the specific problem of commercial piracy of sound recordings. Act of Oct. 15, 1971, 85 Stat. 391 (1971 Amendment). The House Report on the 1971 Amendment, in a section entitled "Home Recording," contains the following statement:

> "In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17. Specifically, it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded per-

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uncontradicted response was that it would apply only in "general terms of science . . . [and] the useful arts." 1975 House Hearings 251 (testimony of Robert W. Cairns); cf. *id.*, at 300 (statement of Harry Rosenfield) ("We are not asking . . . for the right to copy 'Gone With the Wind' ").

[21] The mention in the Senate and House Reports of situations in which copies for private use would be permissible under the fair use doctrine—for example, the making of a free copy for a blind person, 1975 Senate Report 66; 1976 House Report 73, or the "recordings of performances by music students for purposes of analysis and criticism," 1975 Senate Report 63—would be superfluous as well. See n. 12, *supra*.

> formances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years." H. R. Rep. No. 92–487, p. 7 (1971) (1971 House Report).

Similar statements were made during House hearings on the bill[22] and on the House floor,[23] although not in the Senate

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[22] The following exchange took place during the testimony of Barbara Ringer, then Assistant Register of Copyrights:

"[Rep.] BIESTER. . . . I can tell you I must have a small pirate in my own home. My son has a cassette tape recorder, and as a particular record becomes a hit, he will retrieve it onto his little set. . . . [T]his legislation, of course, would not point to his activities, would it?

"Miss RINGER. I think the answer is clearly, 'No, it would not.' I have spoken at a couple of seminars on video cassettes lately, and this question is usually asked: 'What about the home recorders?' The answer I have given and will give again is that this is something you cannot control. You simply cannot control it. My own opinion, whether this is philosophical dogma or not, is that sooner or later there is going to be a crunch here. But that is not what this legislation is addressed to, and I do not see the crunch coming in the immediate future. . . . I do not see anybody going into anyone's home and preventing this sort of thing, or forcing legislation that would engineer a piece of equipment not to allow home taping." Hearings on S. 646 and H. R. 6927 before Subcommittee No. 3 of the House Committee on the Judiciary, 92d Cong., 1st Sess., 22–23 (1971) (1971 House Hearings).

[23] Shortly before passage of the bill, a colloquy took place between Representative Kastenmeier, Chairman of the House Subcommittee that produced the bill, and Representative Kazen, who was not on the Subcommittee:

"Mr. KAZEN. Am I correct in assuming that the bill protects copyrighted material that is duplicated for commercial purposes only?

"Mr. KASTENMEIER. Yes.

"Mr. KAZEN. In other words, if your child were to record off of a program which comes through the air on the radio or television, and then used proceedings. In concluding that these statements created a general exemption for home recording, the District Court, in my view, paid too little heed to the context in which the statements were made, and failed to consider the limited purpose of the 1971 Amendment and the structure of the 1909 Act.

Unlike television broadcasts and other types of motion pictures, sound recordings were not protected by copyright prior to the passage of the 1971 Amendment. Although the underlying musical work could be copyrighted, the 1909 Act provided no protection for a particular performer's rendition of the work. Moreover, copyrighted musical works that had been recorded for public distribution were subject to a "compulsory license": any person was free to record such a work upon payment of a 2-cent royalty to the copyright owner. § 1(e), 35 Stat. 1075–1076. While reproduction without payment of the royalty was an infringement under the 1909 Act, damages were limited to three times the amount of the unpaid royalty. § 25(e), 35 Stat. 1081–1082; *Shapiro, Bernstein & Co.* v. *Goody*, 248 F. 2d 260, 262–263, 265 (CA2 1957), cert. denied, 355 U. S. 952 (1958). It was observed that the practical effect of these provisions was to legalize record piracy. See S. Rep. No. 92–72, p. 4 (1971); 1971 House Report 2.

In order to suppress this piracy, the 1971 Amendment extended copyright protection beyond the underlying work and to the sound recordings themselves. Congress chose, however, to provide only limited protection: owners of copyright in sound recordings were given the exclusive right "[t]o reproduce [their works] and distribute [them] to the public."

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it for her own personal pleasure, for listening pleasure, this use would not be included under the penalties of this bill?

"Mr. KASTENMEIER. This is not included in the bill. I am glad the gentleman raises the point.

"On page 7 of the report, under 'Home Recordings,' Members will note that under the bill the same practice which prevails today is called for; namely, this is considered both presently and under the proposed law to be fair use. The child does not do this for commercial purposes. This is made clear in the report." 117 Cong. Rec. 34748–34749 (1971).

1971 Amendment, § 1(a), 85 Stat. 391 (formerly codified as 17 U. S. C. § 1(f)).[24] This right was merely the right of commercial distribution. See 117 Cong. Rec. 34748–34749 (1971) (colloquy of Reps. Kazen and Kastenmeier) ("the bill protects copyrighted material that is duplicated for commercial purposes only").

Against this background, the statements regarding home recording under the 1971 Amendment appear in a very different light. If home recording was "common and unrestrained" under the 1909 Act, see 1971 House Report 7, it was because sound recordings had no copyright protection and the owner of a copyright in the underlying musical work could collect no more than a 2-cent royalty plus 6 cents in damages for each unauthorized use. With so little at stake, it is not at all surprising that the Assistant Register "d[id] not see anybody going into anyone's home and preventing this sort of thing." 1971 House Hearings 23.

But the references to home sound recording in the 1971 Amendment's legislative history demonstrate no congressional intent to create a generalized home-use exemption from copyright protection. Congress, having recognized that the 1909 Act had been unsuccessful in controlling home sound recording, addressed only the specific problem of commercial record piracy. To quote Assistant Register Ringer again, home use was "not what this legislation [was] addressed to." *Id.*, at 22.[25]

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[24] The 1909 Act's grant of an exclusive right to "copy," § 1(a), was of no assistance to the owner of a copyright in a sound recording, because a reproduction of a sound recording was technically considered not to be a "copy." See 1971 House Hearings 18 (testimony of Barbara Ringer, Assistant Register of Copyrights); 1971 Amendment, § 1(e), 85 Stat. 391 (formerly codified as 17 U. S. C. § 26) ("For the purposes of [specified sections, not including § 1(a)], but not for any other purpose, a reproduction of a [sound recording] shall be considered to be a copy thereof"). This concept is carried forward into the 1976 Act, which distinguishes between "copies" and "phonorecords." See n. 7, *supra*.

[25] During consideration of the 1976 Act, Congress, of course, was well aware of the limited nature of the protection granted to sound recordings

While the 1971 Amendment narrowed the sound recordings loophole in then existing copyright law, motion pictures and other audiovisual works have been accorded full copyright protection since at least 1912, see Act of Aug. 24, 1912, 37 Stat. 488, and perhaps before, see *Edison* v. *Lubin*, 122 F. 240 (CA3 1903), appeal dism'd, 195 U. S. 625 (1904). Congress continued this protection in the 1976 Act. Unlike the sound recording rights created by the 1971 Amendment, the reproduction rights associated with motion pictures under § 106(1) are not limited to reproduction for *public* distribution; the copyright owner's right to reproduce the work exists independently, and the "mere duplication of a copy may constitute an infringement even if it is never distributed." Register's Supplementary Report 16; see 1975 Senate Report 57 and 1976 House Report 61. Moreover, the 1976 Act was intended as a comprehensive treatment of all aspects of copyright law. The Reports accompanying the 1976 Act, unlike the 1971 House Report, contain no suggestion that home-use recording is somehow outside the scope of this all-inclusive statute. It was clearly the intent of Congress that no additional exemptions were to be implied.[26]

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under the 1971 Amendment. See 1975 House Hearings 113 (testimony of Barbara Ringer, Register of Copyrights) (1971 Amendment "created a copyright in a sound recording . . . but limited it to the particular situation of so-called piracy"); *id.*, at 1380 (letter from John Lorenz, Acting Librarian of Congress) (under 1971 Amendment "only the unauthorized reproduction and distribution to the public of copies of the sound recording is prohibited. Thus, the duplication of sound recordings for private, personal use and the performance of sound recordings through broadcasting or other means are outside the scope of the amendment").

[26] Representative Kastenmeier, the principal House sponsor of the 1976 revision bill and Chairman of the House Subcommittee that produced it, made this explicit on the opening day of the House hearings:

"[F]rom time to time, certain areas have not been covered in the bill. But is it not the case, this being a unified code, that the operation of the bill does apply whether or not we specifically deal with a subject or not? . . .

"Therefore, we can really not fail to deal with an issue. It will be dealt

I therefore find in the 1976 Act no implied exemption to cover the home taping of television programs, whether it be for a single copy, for private use, or for home use. Taping a copyrighted television program is infringement unless it is permitted by the fair use exemption contained in § 107 of the 1976 Act. I now turn to that issue.

IV

Fair Use

The doctrine of fair use has been called, with some justification, "the most troublesome in the whole law of copyright." *Dellar* v. *Samuel Goldwyn, Inc.*, 104 F. 2d 661, 662 (CA2 1939); see *Triangle Publications, Inc.* v. *Knight-Ridder Newspapers, Inc.*, 626 F. 2d 1171, 1174 (CA5 1980); *Meeropol* v. *Nizer*, 560 F. 2d 1061, 1068 (CA2 1977), cert. denied, 434 U. S. 1013 (1978). Although courts have constructed lists of factors to be considered in determining whether a particular use is fair,[27] no fixed criteria have emerged by which that

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with one way or the other. The code, title 17, will cover it. So we have made a conscientious decision even by omission. . . .

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". . . By virtue of passing this bill, we will deal with every issue. Whether we deal with it completely or not for the purpose of resolving the issues involved is the only question, not whether it has dealt with the four corners of the bill because the four corners of the bill will presume to deal with everything in copyright." *Id.*, at 115.

[27] The precise phrase "fair use" apparently did not enter the case law until 1869, see *Lawrence* v. *Dana*, 15 F. Cas. 26, 60 (No. 8,136) (CC Mass.), but the doctrine itself found early expression in *Folsom* v. *Marsh*, 9 F. Cas. 342 (No. 4,901) (CC Mass. 1841). Justice Story was faced there with the "intricate and embarrassing questio[n]" whether a biography containing copyrighted letters was "a justifiable use of the original materials, such as the law recognizes as no infringement of the copyright of the plaintiffs." *Id.*, at 344, 348. In determining whether the use was permitted, it was necessary, said Justice Story, to consider "the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or

determination can be made. This Court thus far has provided no guidance; although fair use issues have come here twice, on each occasion the Court was equally divided and no opinion was forthcoming. *Williams & Wilkins Co.* v. *United States*, 203 Ct. Cl. 74, 487 F. 2d 1345 (1973), aff'd, 420 U. S. 376 (1975); *Benny* v. *Loew's Inc.*, 239 F. 2d 532 (CA9 1956), aff'd *sub nom. Columbia Broadcasting System, Inc.* v. *Loew's Inc.*, 356 U. S. 43 (1958).

Nor did Congress provide definitive rules when it codified the fair use doctrine in the 1976 Act; it simply incorporated a list of factors "to be considered": the "purpose and character of the use," the "nature of the copyrighted work," the "amount and substantiality of the portion used," and, perhaps the most important, the "effect of the use upon the *potential* market for or value of the copyrighted work" (emphasis supplied). § 107. No particular weight, however, was assigned to any of these, and the list was not intended to be exclusive. The House and Senate Reports explain that § 107 does no more than give "statutory recognition" to the fair use doctrine; it was intended "to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." 1976 House Report 66. See 1975 Senate Report 62; S. Rep. No. 93-983, p. 116 (1974); H. R. Rep. No. 83, 90th Cong., 1st Sess., 32 (1967); H. R. Rep. No. 2237, 89th Cong., 2d Sess., 61 (1966).

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supersede the objects, of the original work. . . . Much must, in such cases, depend upon the nature of the new work, the value and extent of the copies, and the degree in which the original authors may be injured thereby." *Id.*, at 348-349.

Similar lists were compiled by later courts. See, *e. g.*, *Tennessee Fabricating Co.* v. *Moultrie Mfg. Co.*, 421 F. 2d 279, 283 (CA5), cert. denied, 398 U. S. 928 (1970); *Mathews Conveyer Co.* v. *Palmer-Bee Co.*, 135 F. 2d 73, 85 (CA6 1943); *Columbia Pictures Corp.* v. *National Broadcasting Co.*, 137 F. Supp. 348 (SD Cal. 1955); *Shapiro, Bernstein & Co.* v. *P. F. Collier & Son Co.*, 26 USPQ 40, 43 (SDNY 1934); *Hill* v. *Whalen & Martell, Inc.*, 220 F. 359, 360 (SDNY 1914).

best copy available

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Despite this absence of clear standards, the fair use doctrine plays a crucial role in the law of copyright. The purpose of copyright protection, in the words of the Constitution, is to "promote the Progress of Science and useful Arts." Copyright is based on the belief that by granting authors the exclusive rights to reproduce their works, they are given an incentive to create, and that "encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and the useful Arts.'" *Mazer* v. *Stein*, 347 U. S. 201, 219 (1954). The monopoly created by copyright thus rewards the individual author in order to benefit the public. *Twentieth Century Music Corp.* v. *Aiken*, 422 U. S., at 156; *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 127–128 (1932); see H. R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909).

There are situations, nevertheless, in which strict enforcement of this monopoly would inhibit the very "Progress of Science and useful Arts" that copyright is intended to promote. An obvious example is the researcher or scholar whose own work depends on the ability to refer to and to quote the work of prior scholars. Obviously, no author could create a new work if he were first required to repeat the research of every author who had gone before him.[28] The scholar, like the ordinary user, of course could be left to bargain with each copyright owner for permission to quote from or refer to prior works. But there is a crucial difference between the scholar and the ordinary user. When the ordinary user decides that the owner's price is too high, and forgoes use of the work, only the individual is the loser. When the scholar forgoes the use of a prior work, not only does his own work suffer, but the public is deprived of his contribution to knowledge. The scholar's work, in other words, produces external benefits from which everyone profits. In such a case, the fair use doctrine acts as a form of subsidy—albeit at the first author's expense—to permit the second author to make limited use of the first author's work for the public good. See Latman Fair Use Study 31; Gordon, Fair Use as Market Failure: A Structural Analysis of the *Betamax* Case and its Predecessors, 82 Colum. L. Rev. 1600, 1630 (1982).

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[28] "The world goes ahead because each of us builds on the work of our predecessors. 'A dwarf standing on the shoulders of a giant can see farther than the giant himself.'" Chafee, Reflections on the Law of Copyright: I, 45 Colum. L. Rev. 503, 511 (1945).

A similar subsidy may be appropriate in a range of areas other than pure scholarship. The situations in which fair use is most commonly recognized are listed in § 107 itself; fair use may be found when a work is used "for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research." The House and Senate Reports expand on this list somewhat,[29] and other examples may be found in the case law.[30] Each of these uses, however, reflects a common theme: each is a *productive* use, resulting in some added benefit to the public beyond that produced by the first author's work.[31] The fair use doctrine, in other words, permits works to be used for "socially laudable purposes." See Copyright Office, Briefing Papers on Current Issues, reprinted in 1975 House Hearings 2051, 2055. I am aware of no case in which the reproduction of a copyrighted work for the sole benefit of the user has been held to be fair use.[32]

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[29] Quoting from the Register's 1961 Report, the Senate and House Reports give examples of possible fair uses:

"'quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported.'" 1975 Senate Report 61–62; 1976 House Report 65.

[30] See, *e. g.*, *Triangle Publications, Inc.* v. *Knight-Ridder Newspapers, Inc.*, 626 F. 2d 1171 (CA5 1980) (comparative advertising).

[31] Professor Seltzer has characterized these lists of uses as "reflect[ing] what in fact the subject matter of fair use has in the history of its adjudication consisted in: it has always had to do with the use by a second author of

I do not suggest, of course, that every productive use is a fair use. A finding of fair use still must depend on the facts of the individual case, and on whether, under the circumstances, it is reasonable to expect the user to bargain with the copyright owner for use of the work. The fair use doctrine must strike a balance between the dual risks created by the copyright system: on the one hand, that depriving authors of their monopoly will reduce their incentive to create, and, on the other, that granting authors a complete monopoly will reduce the creative ability of others.[33] The inquiry is

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a first author's work." L. Seltzer, Exemptions and Fair Use in Copyright 24 (1978) (emphasis removed). He distinguishes "the mere reproduction of a work in order to use it for its intrinsic purpose—to make what might be called the 'ordinary' use of it." When copies are made for "ordinary" use of the work, "ordinary *infringement* has customarily been triggered, not notions of fair use" (emphasis in original). *Ibid.* See also 3 M. Nimmer, Copyright § 13.05[A][1] (1983) ("Use of a work in each of the foregoing contexts either necessarily or usually involves its use in a derivative work").

[32] *Williams & Wilkins Co.* v. *United States*, 203 Ct. Cl. 74, 487 F. 2d 1345 (1973), aff'd by an equally divided Court, 420 U. S. 376 (1975), involved the photocopying of scientific journal articles; the Court of Claims stressed that the libraries performing the copying were "devoted solely to the advancement and dissemination of medical knowledge," 203 Ct. Cl., at 91, 487 F. 2d, at 1354, and that "medical science would be seriously hurt if such library photocopying were stopped." *Id.*, at 95, 487 F. 2d, at 1356.

The issue of library copying is now covered by § 108 of the 1976 Act. That section, which Congress regarded as "authoriz[ing] certain photocopying practices which may not qualify as a fair use," 1975 Senate Report 67; 1976 House Report 74, permits the making of copies only for "private study, scholarship, or research." §§ 108(d)(1) and (e)(1).

[33] In the words of Lord Mansfield: "[W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the

necessarily a flexible one, and the endless variety of situations that may arise precludes the formulation of exact rules. But when a user reproduces an entire work and uses it for its original purpose, with no added benefit to the public, the doctrine of fair use usually does not apply. There is then no need whatsoever to provide the ordinary user with a fair use subsidy at the author's expense.

The making of a videotape recording for home viewing is an ordinary rather than a productive use of the Studios' copyrighted works. The District Court found that "Betamax owners use the copy for the same purpose as the original. They add nothing of their own." 480 F. Supp., at 453. Although applying the fair use doctrine to home VTR recording, as Sony argues, may increase public access to material broadcast free over the public airwaves, I think Sony's argument misconceives the nature of copyright. Copyright gives the author a right to limit or even to cut off access to his work. *Fox Film Corp.* v. *Doyal*, 286 U. S., at 127. A VTR recording creates no public benefit sufficient to justify limiting this right. Nor is this right extinguished by the copyright owner's choice to make the work available over the airwaves. Section 106 of the 1976 Act grants the copyright owner the exclusive right to control the performance and the reproduction of his work, and the fact that he has licensed a single television performance is really irrelevant to the existence of his right to control its reproduction. Although a television broadcast may be free to the viewer, this fact is equally irrelevant; a book borrowed from the public library may not be copied any more freely than a book that is purchased.

It may be tempting, as, in my view, the Court today is tempted, to stretch the doctrine of fair use so as to permit unfettered use of this new technology in order to increase ac-

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other, that the world may not be deprived of improvements, nor the progress of the arts be retarded." *Sayre* v. *Moore*, as set forth in *Cary* v. *Longman*, 1 East 358, 361, n. (b), 102 Eng. Rep. 138, 140, n. (b) (K. B. 1785). See Register's Supplementary Report 13.

cess to television programming. But such an extension risks eroding the very basis of copyright law, by depriving authors of control over their works and consequently of their incentive to create.[34] Even in the context of highly productive educational uses, Congress has avoided this temptation; in passing the 1976 Act, Congress made it clear that off-the-air videotaping was to be permitted only in very limited situations. See 1976 House Report 71; 1975 Senate Report 64. And, the Senate Report adds, "[t]he committee does not intend to suggest . . . that off-the-air recording for convenience would under any circumstances, be considered 'fair use.'" *Id.*, at 66. I cannot disregard these admonitions.

B

I recognize, nevertheless, that there are situations where permitting even an unproductive use would have no effect on the author's incentive to create, that is, where the use would not affect the value of, or the market for, the author's work. Photocopying an old newspaper clipping to send to a friend may be an example; pinning a quotation on one's bulletin board may be another. In each of these cases, the effect on the author is truly *de minimis*. Thus, even though these uses provide no benefit to the public at large, no purpose is served by preserving the author's monopoly, and the use may be regarded as fair.

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[34] This point was brought home repeatedly by the Register of Copyrights. Mentioning the "multitude of technological developments" since passage of the 1909 Act, including "remarkable developments in the use of video tape," Register's Supplementary Report xiv–xv, the Register cautioned:

"I realize, more clearly now than I did in 1961, that the revolution in communications has brought with it a serious challenge to the author's copyright. This challenge comes not only from the ever-growing commercial interests who wish to use the author's works for private gain. An equally serious attack has come from people with a sincere interest in the public welfare who fully recognize . . . 'that the real heart of civilization . . . owes its existence to the author'; ironically, in seeking to make the author's works widely available by freeing them from copyright restrictions, they fail to realize that they are whittling away the very thing that nurtures authorship in the first place. An accommodation among conflicting demands must be worked out, true enough, but not by denying the fundamental constitutional directive: to encourage cultural progress by securing the author's exclusive rights to him for a limited time." *Id.*, at xv; see 1975 House Hearings 117 (testimony of Barbara Ringer, Register of Copyrights).

Courts should move with caution, however, in depriving authors of protection from unproductive "ordinary" uses. As has been noted above, even in the case of a productive use, § 107(4) requires consideration of "the effect of the use upon the *potential* market for or value of the copyrighted work" (emphasis added). "[A] particular use which may seem to have little or no economic impact on the author's rights today can assume tremendous importance in times to come." Register's Supplementary Report 14. Although such a use may seem harmless when viewed in isolation, "[i]solated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented." 1975 Senate Report 65.

I therefore conclude that, at least when the proposed use is an unproductive one, a copyright owner need prove only a *potential* for harm to the market for or the value of the copyrighted work. See 3 M. Nimmer, Copyright § 13.05[E][4][c], p. 13–84 (1983). Proof of actual harm, or even probable harm, may be impossible in an area where the effect of a new technology is speculative, and requiring such proof would present the "real danger . . . of confining the scope of an author's rights on the basis of the present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances." Register's Supplementary Report 14. Infringement thus would be found if the copyright owner demonstrates a reasonable possibility that harm will result from the proposed use. When the use is one that creates no benefit to the public at large, copyright protection should not be denied on the basis that a new technology that may result in harm has not yet done so.

The Studios have identified a number of ways in which VTR recording could damage their copyrights. VTR recording could reduce their ability to market their works in movie theaters and through the rental or sale of prerecorded videotapes or videodiscs; it also could reduce their rerun audience, and consequently the license fees available to them for repeated showings. Moreover, advertisers may be willing to pay for only "live" viewing audiences, if they believe VTR viewers will delete commercials or if rating services are unable to measure VTR use; if this is the case, VTR recording could reduce the license fees the Studios are able to charge even for first-run showings. Library-building may raise the potential for each of the types of harm identified by the Studios, and time-shifting may raise the potential for substantial harm as well.[36]

Although the District Court found no likelihood of harm from VTR use, 480 F. Supp., at 468, I conclude that it applied an incorrect substantive standard and misallocated the burden of proof. The District Court reasoned that the Studios had failed to prove that library-building would occur "to any significant extent," *id.*, at 467; that the Studios' prerecorded videodiscs could compete with VTR recordings and were "arguably . . . more desirable," *ibid.*; that it was "not clear that movie audiences will decrease," *id.*, at 468; and that the practice of deleting commercials "may be too tedious" for many viewers, *ibid.* To the extent any decrease in advertising revenues would occur, the court concluded that the Studios had "marketing alternatives at hand to recoup some of that predicted loss." *Id.*, at 452. Because the Studios' prediction of harm was "based on so many assumptions and on a system of marketing which is rapidly changing," the court was "hesitant to identify 'probable effects' of home-use copying." *Ibid.*

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[36] A VTR owner who has taped a favorite movie for repeated viewing will be less likely to rent or buy a tape containing the same movie, watch a televised rerun, or pay to see the movie at a theater. Although time-shifting may not replace theater or rerun viewing or the purchase of prerecorded tapes or discs, it may well replace rental usage; a VTR user who has recorded a first-run movie for later viewing will have no need to rent a copy when he wants to see it. Both library-builders and time-shifters may avoid commercials; the library-builder may use the pause control to record without them, and all users may fast-forward through commercials on playback.

The Studios introduced expert testimony that both time-shifting and librarying would tend to decrease their revenue from copyrighted works. See 480 F. Supp., at 440. The District Court's findings also show substantial library-building and avoidance of commercials. Both sides submitted surveys showing that the average Betamax user owns between 25 and 32 tapes. The Studios' survey showed that at least 40% of users had more than 10 tapes in a "library"; Sony's survey showed that more than 40% of users planned to view their tapes more than once; and both sides' surveys showed that commercials were avoided at least 25% of the time. *Id.*, at 438–439.

The District Court's reluctance to engage in prediction in this area is understandable, but, in my view, the court was mistaken in concluding that the Studios should bear the risk created by this uncertainty. The Studios have demonstrated a potential for harm, which has not been, and could not be, refuted at this early stage of technological development.

The District Court's analysis of harm, moreover, failed to consider the effect of VTR recording on "the *potential* market for or the value of the copyrighted work," as required by § 107(4).[36] The requirement that a putatively infringing use of a copyrighted work, to be "fair," must not impair a "potential" market for the work has two implications. First, an infringer cannot prevail merely by demonstrating that the copyright holder suffered no net harm from the infringer's action. Indeed, even a showing that the infringement has resulted in a net benefit to the copyright holder will not suffice. Rather, the infringer must demonstrate that he had not impaired the copyright holder's ability to demand compensation from (or to deny access to) any group who would otherwise be willing to pay to see or hear the copyrighted work. Second, the fact that a given market for a copyrighted work would not be available to the copyright holder were it not for the infringer's activities does not permit the infringer to exploit that market without compensating the copyright holder. See *Iowa State University Research Foundation, Inc.* v. *American Broadcasting Cos.*, 621 F. 2d 57 (CA2 1980).

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[36] Concern over the impact of a use upon "potential" markets is to be found in cases decided both before and after § 107 lent Congress' imprimatur to the judicially created doctrine of fair use. See, *e. g.*, *Iowa State University Research Foundation, Inc.* v. *American Broadcasting Cos.*, 621 F. 2d 57, 60 (CA2 1980) ("the effect of the use on the copyright holder's potential market for the work"); *Meeropol* v. *Nizer*, 560 F. 2d 1061, 1070 (CA2 1977) ("A key issue in fair use cases is whether the defendant's work tends to diminish or prejudice the potential sale of plaintiff's work"), cert. denied, 434 U. S. 1013 (1978); *Williams & Wilkins Co.* v. *United States*, 203 Ct. Cl., at 88, 487 F. 2d, at 1352 ("the effect of the use on a copyright

In this case, the Studios and their *amici* demonstrate that the advent of the VTR technology created a potential market for their copyrighted programs. That market consists of those persons who find it impossible or inconvenient to watch the programs at the time they are broadcast, and who wish to watch them at other times. These persons are willing to pay for the privilege of watching copyrighted work at their convenience, as is evidenced by the fact that they are willing to pay for VTR's and tapes; undoubtedly, most also would be willing to pay some kind of royalty to copyright holders. The Studios correctly argue that they have been deprived of the ability to exploit this sizable market.

It is thus apparent from the record and from the findings of the District Court that time-shifting does have a substantial

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owner's potential market for and value of his work"); *Encyclopaedia Britannica Educational Corp.* v. *Crooks*, 542 F. Supp. 1156, 1173 (WDNY 1982) ("[T]he concern here must be focused on a copyrighted work's *potential* market. It is perfectly possible that plaintiffs' profits would have been greater, but for the kind of videotaping in question") (emphasis in original).

adverse effect upon the "potential market for" the Studios' copyrighted works. Accordingly, even under the formulation of the fair use doctrine advanced by Sony, time-shifting cannot be deemed a fair use.

V

Contributory Infringement

From the Studios' perspective, the consequences of home VTR recording are the same as if a business had taped the Studios' works off the air, duplicated the tapes, and sold or rented them to members of the public for home viewing. The distinction is that home VTR users do not record for commercial advantage; the commercial benefit accrues to the manufacturer and distributors of the Betamax. I thus must proceed to discuss whether the manufacturer and distributors can be held contributorily liable if the product they sell is used to infringe.

It is well established that liability for copyright infringement can be imposed on persons other than those who actually carry out the infringing activity. *Kalem Co.* v. *Harper Brothers*, 222 U. S. 55, 62–63 (1911); 3 M. Nimmer, Copyright § 12.04[A] (1983); see *Twentieth Century Music Corp.* v. *Aiken*, 422 U. S., at 160, n. 11; *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191, 198 (1931). Although the liability provision of the 1976 Act provides simply that "[a]nyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright," 17 U. S. C. § 501(a) (1982 ed.), the House and Senate Reports demonstrate that Congress intended to retain judicial doctrines of contributory infringement. 1975 Senate Report 57; 1976 House Report 61.[37]

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[37] This intent is manifested further by provisions of the 1976 Act that exempt from liability persons who, while not participating directly in any infringing activity, could otherwise be charged with contributory infringement. See § 108(f)(1) (library not liable "for the unsupervised use of re-

The doctrine of contributory copyright infringement, however, is not well defined. One of the few attempts at definition appears in *Gershwin Publishing Corp.* v. *Columbia Artists Management, Inc.*, 443 F. 2d 1159 (CA2 1971). In that case the Second Circuit stated that "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer." *Id.*, at 1162 (footnote omitted). While I have no quarrel with this general statement, it does not easily resolve the present case; the District Court and the Court of Appeals, both purporting to apply it, reached diametrically opposite results.

A

In absolving Sony from liability, the District Court reasoned that Sony had no direct involvement with individual Betamax users, did not participate in any off-the-air copying, and did not know that such copying was an infringement of the Studios' copyright. 480 F. Supp., at 460. I agree with the *Gershwin* court that contributory liability may be imposed even when the defendant has no formal control over the infringer. The defendant in *Gershwin* was a concert promoter operating through local concert associations that it sponsored; it had no formal control over the infringing performers themselves. 443 F. 2d, at 1162–1163. See also *Twentieth Century Music Corp.* v. *Aiken*, 422 U. S., at 160, n. 11. Moreover, a finding of contributory infringement has never depended on actual knowledge of particular instances of infringement; it is sufficient that the defendant have reason to know that infringement is taking place. 443 F. 2d,

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producing equipment located on its premises," provided that certain warnings are posted); § 110(6) ("governmental body" or "nonprofit agricultural or horticultural organization" not liable for infringing performance by concessionaire "in the course of an annual agricultural or horticultural fair or exhibition").

at 1162; see *Screen Gems-Columbia Music, Inc.* v. *Mark-Fi Records, Inc.*, 256 F. Supp. 399 (SDNY 1966).[38] In the so-called "dance hall" cases, in which questions of contributory infringement arise with some frequency, proprietors of entertainment establishments routinely are held liable for unauthorized performances on their premises, even when they have no knowledge that copyrighted works are being performed. In effect, the proprietors in those cases are charged with constructive knowledge of the performances.[39]

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[38] In *Screen Gems*, on which the *Gershwin* court relied, the court held that liability could be imposed on a shipper of unauthorized "bootleg" records and a radio station that broadcast advertisements of the records, provided they knew or should have known that the records were infringing. The court concluded that the records' low price and the manner in which the records were marketed could support a finding of "constructive knowledge" even if actual knowledge were not shown.

[39] See, *e. g., Famous Music Corp.* v. *Bay State Harness Horse Racing & Breeding Assn., Inc.*, 554 F. 2d 1213 (CA1 1977); *Dreamland Ball Room, Inc.* v. *Shapiro, Bernstein & Co.*, 36 F. 2d 354 (CA7 1929); *M. Witmark & Sons* v. *Tremont Social & Athletic Club*, 188 F. Supp. 787, 790 (Mass. 1960); see also *Twentieth Century Music Corp.* v. *Aiken*, 422 U. S. 151, 157 (1975); *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191, 198–199 (1931); 3 M. Nimmer, Copyright § 12.04[A], p. 12–35 (1983).

Courts have premised liability in these cases on the notion that the defendant had the ability to supervise or control the infringing activities, see, *e. g., Shapiro, Bernstein & Co.* v. *H. L. Green Co.*, 316 F. 2d 304, 307 (CA2 1963); *KECA Music, Inc.* v. *Dingus McGee's Co.*, 432 F. Supp. 72, 74 (WD Mo. 1977). This notion, however, is to some extent fictional; the defendant cannot escape liability by instructing the performers not to play the copyrighted music, or even by inserting a provision to that effect into the performers' contract. *Famous Music Corp.* v. *Bay State Harness Horse Racing & Breeding Assn., Inc.*, 554 F. 2d, at 1214–1215; *KECA Music, Inc.* v. *Dingus McGee's Co.*, 432 F. Supp., at 75; *Shapiro, Bernstein & Co.* v. *Veltin*, 47 F. Supp. 648, 649 (WD La. 1942). Congress expressly rejected a proposal to exempt proprietors from this type of liability under the 1976 Act. See 1975 Senate Report 141–142; 1976 House Report 159–160; 1975 House Hearings 1812–1813 (testimony of Barbara Ringer, Register of Copyrights); *id.*, at 1813 (colloquy between Rep. Pattison and Barbara Ringer).

The Court's attempt to distinguish these cases on the ground of "control," *ante*, at 437, is obviously unpersuasive. The direct infringer ordi-

Nor is it necessary that the defendant be aware that the infringing activity violates the copyright laws. Section 504(c)(2) of the 1976 Act provides for a reduction in statutory damages when an infringer proves he "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright," but the statute establishes no general exemption for those who believe their infringing activities are legal. Moreover, such an exemption would be meaningless in a case such as this, in which prospective relief is sought; once a court has established that the copying at issue is infringement, the defendants are necessarily aware of that fact for the future. It is undisputed in this case that Sony had reason to know the Betamax would be used by some owners to tape copyrighted works off the air. See 480 F. Supp., at 459–460.

The District Court also concluded that Sony had not caused, induced, or contributed materially to any infringing activities of Betamax owners. *Id.*, at 460. In a case of this kind, however, causation can be shown indirectly; it does not depend on evidence that particular Betamax owners relied on particular advertisements. In an analogous case decided just two Terms ago, this Court approved a lower court's conclusion that liability for contributory trademark infringement could be imposed on a manufacturer who "suggested, even by implication" that a retailer use the manufacturer's goods to infringe the trademark of another. *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U. S. 844, 851 (1982); see *id.*, at 860 (opinion concurring in result). I think this standard is equally appropriate in the copyright context.

The District Court found that Sony has advertised the Betamax as suitable for off-the-air recording of "favorite shows," "novels for television," and "classic movies," 480 F. Supp., at 436, with no visible warning that such recording

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narily is not employed by the person held liable; instead, he is an independent contractor. Neither is he always an agent of the person held liable; *Screen Gems* makes this apparent.

could constitute copyright infringement. It is only with the aid of the Betamax or some other VTR, that it is possible today for home television viewers to infringe copyright by recording off-the-air. Off-the-air recording is not only a foreseeable use for the Betamax, but indeed is its intended use. Under the circumstances, I agree with the Court of Appeals that if off-the-air recording is an infringement of copyright, Sony has induced and materially contributed to the infringing conduct of Betamax owners.[40]

B

Sony argues that the manufacturer or seller of a product used to infringe is absolved from liability whenever the product can be put to any substantial noninfringing use. Brief for Petitioners 41–42. The District Court so held, borrowing the "staple article of commerce" doctrine governing liability for contributory infringement of patents. See 35 U. S. C. § 271.[41] This Court today is much less positive. See *ante*, at 440–442. I do not agree that this technical judge-made doctrine of patent law, based in part on considerations irrelevant to the field of copyright, see generally *Dawson Chemical Co.* v. *Rohm & Haas Co.*, 448 U. S. 176, 187–199 (1980), should be imported wholesale into copyright law. Despite their common constitutional source, see U. S. Const., Art. I, §8, cl. 8, patent and copyright protections have not developed in a parallel fashion, and this Court in copyright cases in the past has borrowed patent concepts only sparingly. See *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 345–346 (1908).

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[40] My conclusion respecting contributory infringement does not include the retailer defendants. The District Court found that one of the retailer defendants had assisted in the advertising campaign for the Betamax, but made no other findings respecting their knowledge of the Betamax's intended uses. I do not agree with the Court of Appeals, at least on this record, that the retailers "are sufficiently engaged in the enterprise to be held accountable," 659 F. 2d 963, 976 (1981). In contrast, the advertising agency employed to promote the Betamax was far more actively engaged in the advertising campaign, and petitioners have not argued that the agency's liability differs in any way from that of Sony Corporation and Sony Corporation of America.

[41] The "staple article of commerce" doctrine protects those who manufacture products incorporated into or used with patented inventions—for example, the paper and ink used with patented printing machines, *Henry* v. *A. B. Dick Co.*, 224 U. S. 1 (1912), or the dry ice used with patented refrigeration systems, *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27 (1931). Because a patent holder has the right to control the use of the patented item as well as its manufacture, see *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, 509–510 (1917); 35 U. S. C. § 271(a), such protection for the manufacturer of the incorporated product is necessary to prevent patent holders from extending their monopolies by

I recognize, however, that many of the concerns underlying the "staple article of commerce" doctrine are present in copyright law as well. As the District Court noted, if liability for contributory infringement were imposed on the manufacturer or seller of every product used to infringe—a typewriter, a camera, a photocopying machine—the "wheels of commerce" would be blocked. 480 F. Supp., at 461; see also *Kalem Co.* v. *Harper Brothers*, 222 U. S., at 62.

I therefore conclude that if a *significant* portion of the product's use is *noninfringing*, the manufacturers and sellers cannot be held contributorily liable for the product's infringing uses. See *ante*, at 440–441. If virtually all of the product's use, however, is to infringe, contributory liability may be imposed; if no one would buy the product for noninfringing purposes alone, it is clear that the manufacturer is purposely profiting from the infringement, and that liability is appropriately imposed. In such a case, the copyright owner's monopoly would not be extended beyond its proper bounds; the manufacturer of such a product contributes to the infringing activities of others and profits directly thereby, while

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suppressing competition in unpatented components and supplies suitable for use with the patented item. See *Dawson Chemical Co.* v. *Rohm & Haas Co.*, 448 U. S. 176, 197–198 (1980). The doctrine of contributory patent infringement has been the subject of attention by the courts and by Congress, see *id.*, at 202–212, and has been codified since 1952, 66 Stat. 792, but was never mentioned during the copyright law revision process as having any relevance to contributory *copyright* infringement.

providing no benefit to the public sufficient to justify the infringement.

The Court of Appeals concluded that Sony should be held liable for contributory infringement, reasoning that "[v]ideo-tape recorders are manufactured, advertised, and sold for the primary purpose of reproducing television programming," and "[v]irtually all television programming is copyrighted material." 659 F. 2d, at 975. While I agree with the first of these propositions,[42] the second, for me, is problematic. The key question is not the amount of television programming that is copyrighted, but rather the amount of VTR usage that is infringing.[43] Moreover, the parties and their *amici* have argued vigorously about both the amount of television programming that is covered by copyright and the amount for which permission to copy has been given. The proportion of VTR recording that is infringing is ultimately a question of fact,[44] and the District Court specifically declined to make findings on the "percentage of legal versus illegal home-use recording." 480 F. Supp., at 468. In light of my view of the law, resolution of this factual question is essential. I therefore would remand the case for further consideration of this by the District Court.

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[42] Although VTR's also may be used to watch prerecorded video cassettes and to make home motion pictures, these uses do not require a tuner such as the Betamax contains. See n. 1, *supra*. The Studios do not object to Sony's sale of VTR's without tuners. Brief for Respondents 5, n. 9. In considering the noninfringing uses of the Betamax, therefore, those uses that would remain possible without the Betamax's built-in tuner should not be taken into account.

[43] Noninfringing uses would include, for example, recording works that are not protected by copyright, recording works that have entered the public domain, recording with permission of the copyright owner, and, of course, any recording that qualifies as fair use. See, *e. g., Bruzzone* v. *Miller Brewing Co.*, 202 USPQ 809 (ND Cal. 1979) (use of home VTR for market research studies).

[44] Sony asserts that much or most television broadcasting is available for home recording because (1) no copyright owner other than the Studios has brought an infringement action, and (2) much televised material is ineligible for copyright protection because videotapes of the broadcasts are not kept. The first of these assertions is irrelevant; Sony's liability does not turn on the fact that only two copyright owners thus far have brought suit. The amount of infringing use must be determined through consideration of the television market as a whole. Sony's second assertion is based on a faulty premise; the Copyright Office permits audiovisual works transmit-

VI

The Court has adopted an approach very different from the one I have outlined. It is my view that the Court's approach alters dramatically the doctrines of fair use and contributory infringement as they have been developed by Congress and the courts. Should Congress choose to respond to the Court's decision, the old doctrines can be resurrected. As it stands, however, the decision today erodes much of the coherence that these doctrines have struggled to achieve.

The Court's disposition of the case turns on its conclusion that time-shifting is a fair use. Because both parties agree that time-shifting is the primary use of VTR's, that conclusion, if correct, would settle the issue of Sony's liability under almost any definition of contributory infringement. The Court concludes that time-shifting is fair use for two reasons. Each is seriously flawed.

The Court's first reason for concluding that time-shifting is fair use is its claim that many copyright holders have no objection to time-shifting, and that "respondents have no right to prevent other copyright holders from authorizing it for their programs." *Ante*, at 442. The Court explains that a finding of contributory infringement would "inevitably frustrate the interests of broadcasters in reaching the portion of their audience that is available only through time-shifting."

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ted by television to be registered by deposit of sample frames plus a description of the work. See 37 CFR §§ 202.20(c)(2)(ii) and 202.21(g) (1983). Moreover, although an infringement action cannot be brought unless the work is registered, 17 U. S. C. § 411(a) (1982 ed.), registration is not a condition of copyright protection. § 408(a). Copying an unregistered work still may be infringement. Cf. § 506(a) (liability for criminal copyright infringement; not conditioned on prior registration).

Ante, at 446. Such reasoning, however, simply confuses the question of liability with the difficulty of fashioning an appropriate remedy. It may be that an injunction prohibiting the sale of VTR's would harm the interests of copyright holders who have no objection to others making copies of their programs. But such concerns should and would be taken into account in fashioning an appropriate remedy once liability has been found. Remedies may well be available that would not interfere with authorized time-shifting at all. The Court of Appeals mentioned the possibility of a royalty payment that would allow VTR sales and time-shifting to continue unabated, and the parties may be able to devise other narrowly tailored remedies. Sony may be able, for example, to build a VTR that enables broadcasters to scramble the signal of individual programs and "jam" the unauthorized recording of them. Even were an appropriate remedy not available at this time, the Court should not misconstrue copyright holders' rights in a manner that prevents enforcement of them when, through development of better techniques, an appropriate remedy becomes available.[45]

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[45] Even if concern with remedy were appropriate at the liability stage, the Court's use of the District Court's findings is somewhat cavalier. The Court relies heavily on testimony by representatives of professional sports leagues to the effect that they have no objection to VTR recording. The Court never states, however, whether the sports leagues are copyright holders, and if so, whether they have exclusive copyrights to sports broadcasts. It is therefore unclear whether the sports leagues have authority to consent to copying the broadcasts of their events.

Assuming that the various sports leagues do have exclusive copyrights in some of their broadcasts, the amount of authorized time-shifting still would not be overwhelming. Sony's own survey indicated that only 7.3% of all Betamax use is to record sports events of all kinds. Tr. 2353, Defendants' Exh. OT, Table 20. Because Sony's witnesses did not represent all forms of sports events, moreover, this figure provides only a tenuous basis for this Court to engage in factfinding of its own.

The only witness at trial who was clearly an exclusive copyright owner and who expressed no objection to unauthorized time-shifting was the owner of the copyright in Mister Rogers' Neighborhood. But the Court

The Court's second stated reason for finding that Sony is not liable for contributory infringement is its conclusion that even unauthorized time-shifting is fair use. *Ante*, at 447 *et seq.* This conclusion is even more troubling. The Court begins by suggesting that the fair use doctrine operates as a general "equitable rule of reason." That interpretation mischaracterizes the doctrine, and simply ignores the language of the statute. Section 107 establishes the fair use doctrine "for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research." These are all productive uses. It is true that the legislative history states repeatedly that the doctrine must be applied flexibly on a case-by-case basis, but those references were only in the context of productive uses. Such a limitation on fair use comports with its purpose, which is to facilitate the creation of new works. There is no indication that the fair use doctrine has any application for purely personal consumption on the scale involved in this case,[46] and the Court's application of it here deprives fair use of the major cohesive force that has guided evolution of the doctrine in the past.

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cites no evidence in the record to the effect that anyone makes VTR copies of that program. The simple fact is that the District Court made no findings on the amount of authorized time-shifting that takes place. The Court seems to recognize this gap in its reasoning, and phrases its argument as a hypothetical. The Court states: "*If* there are millions of owners of VTR's who make copies of televised sports events, religious broadcasts, and educational programs such as Mister Rogers' Neighborhood, and *if* the proprietors of those programs welcome the practice," the sale of VTR's "should not be stifled" in order to protect respondents' copyrights. *Ante*, at 446 (emphasis supplied). Given that the Court seems to recognize that its argument depends on findings that have not been made, it seems that a remand is inescapable.

[46] As has been explained, some uses of time-shifting, such as copying an old newspaper clipping for a friend, are fair use because of their *de minimis* effect on the copyright holder. The scale of copying involved in this case, of course, is of an entirely different magnitude, precluding application of such an exception.

Having bypassed the initial hurdle for establishing that a use is fair, the Court then purports to apply to time-shifting the four factors explicitly stated in the statute. The first is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." § 107(1). The Court confidently describes time-shifting as a noncommercial, nonprofit activity. It is clear, however, that personal use of programs that have been copied without permission is not what § 107(1) protects. The intent of the section is to encourage users to engage in activities the primary benefit of which accrues to others. Time-shifting involves no such humanitarian impulse. It is likewise something of a mischaracterization of time-shifting to describe it as noncommercial in the sense that that term is used in the statute. As one commentator has observed, time-shifting is noncommercial in the same sense that stealing jewelry and wearing it—instead of reselling it—is noncommercial.[47] Purely consumptive uses are certainly not what the fair use doctrine was designed to protect, and the awkwardness of applying the statutory language to time-shifting only makes clearer that fair use was designed to protect only uses that are productive.

The next two statutory factors are all but ignored by the Court—though certainly not because they have no applicability. The second factor—"the nature of the copyrighted work"—strongly supports the view that time-shifting is an infringing use. The rationale guiding application of this factor is that certain types of works, typically those involving "more of diligence than of originality or inventiveness," *New York Times Co.* v. *Roxbury Data Interface, Inc.*, 434 F. Supp. 217, 221 (NJ 1977), require less copyright protection than other original works. Thus, for example, informational works, such as news reports, that readily lend themselves to productive use by others, are less protected than creative works of entertainment. Sony's own surveys indicate that entertainment shows account for more than 80% of the programs recorded by Betamax owners.[48]

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[47] Home Recording of Copyrighted Works: Hearing before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 97th Cong., 2d Sess., pt. 2, p. 1250 (1982) (memorandum of Prof. Laurence H. Tribe).

The third statutory factor—"the amount and substantiality of the portion used"—is even more devastating to the Court's interpretation. It is undisputed that virtually all VTR owners record entire works, see 480 F. Supp., at 454, thereby creating an exact substitute for the copyrighted original. Fair use is intended to allow individuals engaged in productive uses to copy small portions of original works that will facilitate their own productive endeavors. Time-shifting bears no resemblance to such activity, and the complete duplication that it involves might alone be sufficient to preclude a finding of fair use. It is little wonder that the Court has chosen to ignore this statutory factor.[49]

The fourth factor requires an evaluation of "the effect of the use upon the potential market for or value of the copyrighted work." This is the factor upon which the Court focuses, but once again, the Court has misread the statute. As mentioned above, the statute requires a court to consider the effect of the use on the *potential* market for the copyrighted work. The Court has struggled mightily to show that VTR use has not *reduced* the value of the Studios' copyrighted works in their *present* markets. Even if true, that showing only begins the proper inquiry. The development of the VTR has created a new market for the works produced by the Studios. That market consists of those persons who desire to view television programs at times other than when they are broadcast, and who therefore purchase VTR recorders to enable them to time-shift.[50] Because time-shifting of the Studios' copyrighted works involves the copying of them, however, the Studios are entitled to share in the benefits of that new market. Those benefits currently go to Sony through Betamax sales. Respondents therefore can show harm from VTR use simply by showing that the value of their copyrights would *increase* if they were compensated for the copies that are used in the new market. The existence of this effect is self-evident.

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[48] See A Survey of Betamax Owners, Tr. 2353, Defendants' Exh. OT, Table 20, cited in Brief for Respondents 52.

[49] The Court's one oblique acknowledgment of this third factor, *ante*, at 447, and n. 30, seems to suggest that the fact that time-shifting involves copying complete works is not very significant because the viewers already have been asked to watch the initial broadcast free. This suggestion misses the point. As has been noted, a book borrowed from a public library may not be copied any more freely than one that has been purchased. An invitation to view a showing is completely different from an invitation to copy a copyrighted work.

Because of the Court's conclusion concerning the legality of time-shifting, it never addresses the amount of noninfringing use that a manufacturer must show to absolve itself from liability as a contributory infringer. Thus, it is difficult to discuss how the Court's test for contributory infringement would operate in practice under a proper analysis of time-shifting. One aspect of the test as it is formulated by the Court, however, particularly deserves comment. The Court explains that a manufacturer of a product is not liable for contributory infringement as long as the product is "*capable* of substantial noninfringing uses." *Ante*, at 442 (emphasis supplied). Such a definition essentially eviscerates the concept of contributory infringement. Only the most unimaginative manufacturer would be unable to demonstrate that a image-duplicating product is "capable" of substantial noninfringing uses. Surely Congress desired to prevent the sale of products that are used almost exclusively to infringe copyrights;

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[50] The Court implicitly has recognized that this market is very significant. The central concern underlying the Court's entire opinion is that there is a large audience who would like very much to be able to view programs at times other than when they are broadcast. *Ante*, at 446. The Court simply misses the implication of its own concerns.

the fact that noninfringing uses exist presumably would have little bearing on that desire.

More importantly, the rationale for the Court's narrow standard of contributory infringement reveals that, once again, the Court has confused the issue of liability with that of remedy. The Court finds that a narrow definition of contributory infringement is necessary in order to protect "the rights of others freely to engage in substantially unrelated areas of commerce." *Ante*, at 442. But application of the contributory infringement doctrine implicates such rights only if the remedy attendant upon a finding of liability were an injunction against the manufacture of the product in question. The issue of an appropriate remedy is not before the Court at this time, but it seems likely that a broad injunction is not the remedy that would be ordered. It is unfortunate that the Court has allowed its concern over a remedy to infect its analysis of liability.

VII

The Court of Appeals, having found Sony liable, remanded for the District Court to consider the propriety of injunctive or other relief. Because of my conclusion as to the issue of liability, I, too, would not decide here what remedy would be appropriate if liability were found. I concur, however, in the Court of Appeals' suggestion that an award of damages, or continuing royalties, or even some form of limited injunction, may well be an appropriate means of balancing the equities in this case.[51] Although I express no view on the merits of any particular proposal, I am certain that, if Sony were found liable in this case, the District Court would be able to fashion appropriate relief. The District Court might conclude, of course, that a continuing royalty or other equitable relief is not feasible. The Studios then would be relegated to statutory damages for proven instances of infringement. But the difficulty of fashioning relief, and the possibility that complete relief may be unavailable, should not affect our interpretation of the statute.

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[51] Other nations have imposed royalties on the manufacturers of products used to infringe copyright. See, *e. g.*, Copyright Laws and Treaties of the World (UNESCO/BNA 1982) (English translation), reprinting Federal Act on Copyright in Works of Literature and Art and on Related Rights (Austria), §§ 42(5)–(7), and An Act dealing with Copyright and Related Rights (Federal Republic of Germany), Art. 53(5). A study produced for the Commission of European Communities has recommended that these requirements "serve as a pattern" for the European community. A. Dietz, Copyright Law in the European Community 135 (1978). While these roy-

Like so many other problems created by the interaction of copyright law with a new technology, "[t]here can be no really satisfactory solution to the problem presented here, until Congress acts." *Twentieth Century Music Corp.* v. *Aiken*, 422 U. S., at 167 (dissenting opinion). But in the absence of a congressional solution, courts cannot avoid difficult problems by refusing to apply the law. We must "take the Copyright Act . . . as we find it," *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U. S., at 401–402, and "do as little damage as possible to traditional copyright principles . . . until the Congress legislates." *Id.*, at 404 (dissenting opinion).

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alty systems ordinarily depend on the existence of authors' collecting societies, see *id.*, at 119, 136, such collecting societies are a familiar part of our copyright law. See generally *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S. 1, 4–5 (1979). Fashioning relief of this sort, of course, might require bringing other copyright owners into court through certification of a class or otherwise.

PRESS-ENTERPRISE CO. *v.* SUPERIOR COURT OF CALIFORNIA, RIVERSIDE COUNTY

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

No. 82-556. Argued October 12, 1983—Decided January 18, 1984

Before the *voir dire* examination of prospective jurors began at a trial in California Superior Court for the rape and murder of a teenage girl, petitioner moved that the *voir dire* be open to the public and the press. The State opposed the motion, arguing that if the press were present, juror responses would lack the candor necessary to assure a fair trial. The trial judge agreed and permitted petitioner to attend the "general" but not the "individual" *voir dire* proceedings. All but approximately three days of the 6-week *voir dire* was thus closed to the public. After the jury was empaneled, petitioner moved for release of the complete transcript of the *voir dire* proceedings, but both defense counsel and the prosecutor argued that release of the transcript would violate the jurors' right to privacy. The court denied the motion and, after the defendant had been convicted and sentenced to death, denied petitioner's second application for release of the *voir dire* transcript. Petitioner then sought in the California Court of Appeal a writ of mandate to compel the trial court to release the transcript and vacate the order closing the *voir dire* proceedings. The petition was denied, and the California Supreme Court denied petitioner's request for a hearing.

Held:

1. The guarantees of open public proceedings in criminal trials cover proceedings for the *voir dire* examination of potential jurors. Pp. 505–510.

(a) The historical evidence reveals that the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown. The presumptive openness of the jury selection process in England carried over into proceedings in colonial America, and public jury selection was the common practice in America when the Constitution was adopted. Pp. 505–508.

(b) Openness enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the criminal justice system. Public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected. Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness.

The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. Pp. 508–510.

2. The presumption of openness has not been rebutted in this case. There were no findings to support the trial court's conclusion that an open proceeding would threaten the defendant's right to a fair trial and the prospective jurors' interests in privacy. Even with findings adequate to support closure, the court's orders denying access to the *voir dire* transcript failed to consider whether alternatives were available to protect the prospective jurors' interests. To preserve fairness and at the same time protect legitimate privacy, a trial judge should inform the prospective jurors, once the general nature of sensitive questions is made known to them, that those individuals believing public questioning will prove damaging because of embarrassment, may properly request an opportunity to present the problem to the judge *in camera* but with counsel present and on the record. When limited closure is ordered, the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time, if the judge determines that disclosure can be accomplished while safeguarding the juror's valid privacy interests. Even then a valid privacy interest may rise to a level that part of the transcript should be sealed, or the name of a juror withheld, to protect the person from embarrassment. Pp. 510–513.

Vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., *post*, p. 513, and STEVENS, J., *post*, p. 516, filed concurring opinions. MARSHALL, J., filed an opinion concurring in the judgment, *post*, p. 520.

James D. Ward argued the cause for petitioner. With him on the briefs was *John A. Boyd*.

Glenn Robert Salter argued the cause for respondent. With him on the brief were *Gerald J. Geerlings* and *Joyce Ellen Manulis Reikes*.*

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*Briefs of *amici curiae* urging reversal were filed for the Society of Professional Journalists, Sigma Delta Chi, et al. by *Bruce W. Sanford, W. Terry Maguire, Pamela J. Riley, Richard M. Schmidt, Jr., Donald F. Luke, Robert C. Lobdell, Robert S. Warren, Erwin G. Krasnow, Mark L. Tuft*, and *Boisfeuillet Jones, Jr.*; and for USA Today et al. by *John*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the guarantees of open public proceedings in criminal trials cover proceedings for the *voir dire* examination of potential jurors.

I

Albert Greenwood Brown, Jr., was tried and convicted of the rape and murder of a teenage girl, and sentenced to death in California Superior Court. Before the *voir dire* examination of prospective jurors began, petitioner, Press-Enterprise Co., moved that the *voir dire* be open to the public and the press. Petitioner contended that the public had an absolute right to attend the trial, and asserted that the trial commenced with the *voir dire* proceedings. The State opposed petitioner's motion, arguing that if the press were present, juror responses would lack the candor necessary to assure a fair trial.

The trial judge agreed and permitted petitioner to attend only the "general voir dire." He stated that counsel would conduct the "individual voir dire with regard to death qualifications and any other special areas that counsel may feel some problem with regard to . . . in private. . . ." App. 93. The *voir dire* consumed *six weeks* and all but approximately three days was closed to the public.

After the jury was empaneled, petitioner moved the trial court to release a complete transcript of the *voir dire* proceedings. At oral argument on the motion, the trial judge

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E. Carne, Judith R. Epstein, Alice Neff Lucan, Edward J. McIntyre, Douglas T. Foster, and *Michael B. Dorais.*

A brief of *amicus curiae* urging affirmance was filed by *Joseph Peter Myers, pro se.*

Briefs of *amici curiae* were filed for the California State Public Defender by *Quin Denvir, Michael G. Millman,* and *Joseph Levine;* and for the State of California by *John K. Van De Kamp,* Attorney General, *Harley D. Mayfield,* Assistant Attorney General, and *Keith I. Motley,* Deputy Attorney General.

described the responses of prospective jurors at their *voir dire:*

> "Most of them are of little moment. There are a few, however, in which some personal problems were discussed which could be somewhat sensitive as far as publication of those particular individuals' situations are concerned." *Id.*, at 103.

Counsel for Brown argued that release of the transcript would violate the jurors' right of privacy. The prosecutor agreed, adding that the prospective jurors had answered questions under an "implied promise of confidentiality." *Id.*, at 111. The court denied petitioner's motion, concluding as follows:

> "I agree with much of what defense counsel and People's counsel have said and I also, regardless of the public's right to know, I also feel that's rather difficult that by a person performing their civic duty as a prospective juror putting their private information as open to the public which I just think there is certain areas that the right of privacy should prevail and a right to a fair trial should prevail and the right of the people to know, I think, should have some limitations and, so, at this stage, the motion to open up . . . the individual sequestered voir dire proceedings is denied without prejudice." *Id.*, at 121.

After Brown had been convicted and sentenced to death, petitioner again applied for release of the transcript. In denying this application, the judge stated:

> "The jurors were questioned in private relating to past experiences, and while most of the information is dull and boring, some of the jurors had some special experiences in sensitive areas that do not appear to be appropriate for public discussion." *Id.*, at 39.

Petitioner then sought in the California Court of Appeal a writ of mandate to compel the Superior Court to release the transcript and vacate the order closing the *voir dire* proceedings. The petition was denied. The California Supreme Court denied petitioner's request for a hearing. We granted certiorari. 459 U. S. 1169 (1983). We reverse.

II

The trial of a criminal case places the factfinding function in a jury of 12 unless by statute or consent the jury is fixed at a lesser number or a jury is waived. The process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system. In *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555, 569 (1980), the plurality opinion summarized the evolution of the criminal trial as we know it today and concluded that "at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open." A review of the historical evidence is also helpful for present purposes. It reveals that, since the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown.

A

The roots of open trials reach back to the days before the Norman Conquest when cases in England were brought before "moots," a town meeting kind of body such as the local court of the hundred or the county court.[1] Attendance was virtually compulsory on the part of the freemen of the community, who represented the "patria," or the "country," in rendering judgment. The public aspect thus was "almost a necessary incident of jury trials, since the presence of a jury . . . already insured the presence of a large part of the public."[2]

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[1] Pollock, English Law Before the Norman Conquest, 1 Select Essays in Anglo-American Legal History 88, 89 (1907).

[2] Radin, The Right to a Public Trial, 6 Temp. L. Q. 381, 388 (1932); see 3 W. Blackstone, Commentaries *349.

As the jury system evolved in the years after the Norman Conquest, and the jury came to be but a small segment representing the community, the obligation of all freemen to attend criminal trials was relaxed; however, the public character of the proceedings, including jury selection, remained unchanged. Later, during the 14th and 15th centuries, the jury became an impartial trier of facts, owing in large part to a development in that period, allowing challenges.[3] 1 W. Holdsworth, History of English Law 332, 335 (7th ed. 1956). Since then, the accused has generally enjoyed the right to challenge jurors in open court at the outset of the trial.[4]

Although there appear to be few contemporary accounts of the process of jury selection of that day,[5] one early record written in 1565 places the trial "[i]n the towne house, or in some open or common place." T. Smith, De Republica

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[3] In 1352, a statute was enacted to permit challenges to petit jurors on the ground of their participation as "indicators" on the presenting jury. 25 Edw. 3, Stat. 5, ch. 3; see T. Plucknett, A Concise History of Common Law 109 (1929). Objections had always been allowed on grounds of personal hostility. 1 W. Holdsworth, History of English Law 332, 324–325 (7th ed. 1956).

[4] In *Peter Cook's Trial*, 4 Har. St. Tr. 737, 738–740 (O. B. 1696), the accused himself attempted to pose questions directly to jurors in order to sustain challenges. "You may ask upon a Voyer Dire, whether he [the juror] have any Interest in the Cause; nor shall we deny you Liberty to ask whether he be fitly qualified, according to Law by having a Freehold of sufficient Value." *Id.*, at 748. And in *Harrison's Trial*, 2 Har. St. Tr. 308, 313 (O. B. 1660), the reporter remarks that the defendant's persistence in challenging jurors provoked laughter in the courtroom: "*Here the People seemed to laugh*," he writes, upon the defendant's 10th peremptory challenge.

[5] As noted in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555, 565, n. 5 (1980), it is not surprising that there is little in the way of contemporary record of the openness of those early trials. Historians have commented that early Anglo-Saxon laws "deal rather with the novel and uncertain, than with the normal and undoubted rules of law. . . . Why trouble to record that which every village elder knows?" E. Jenks, A Short History of English Law 3–4 (2d ed. 1922).

Anglorum 96 (Alston ed. 1906). Smith explained that "there is nothing put in writing but the enditement":

> "All the rest is doone openlie in the presence of the Judges, the Justices, the enquest, the prisoner, *and so many as will or can come so neare as to heare it*, and all depositions and witnesses given aloude, *that all men may heare from the mouth of the depositors and witnesses what is saide.*" *Id.*, at 101 (emphasis added).

If we accept this account it appears that beginning in the 16th century, jurors were selected in public.

As the trial began, the judge and the accused were present. Before calling jurors, the judge "telleth the cause of their comming, *and* [thereby] *giveth a good lesson to the people.*" *Id.*, at 96–97 (emphasis added). The indictment was then read; if the accused pleaded not guilty, the jurors were called forward, one by one, at which time the defendant was allowed to make his challenges. *Id.*, at 98. Smith makes clear that the entire trial proceeded "openly, that not only the xii [12 jurors], but the Judges, the parties *and as many* [others] *as be present may heare.*" *Id.*, at 79 (emphasis added).

This open process gave assurance to those not attending trials that others were able to observe the proceedings and enhanced public confidence. The presence of bystanders served yet another purpose according to Blackstone. If challenges kept a sufficient number of qualified jurors from appearing at the trial, "either party may pray a *tales*." 3 W. Blackstone Commentaries *364; see also M. Hale, The History of the Common Law of England 342 (6th ed. 1820). A "tales" was the balance necessary to supply the deficiency.[6]

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[6] By the statute 35 Hen. 8, ch. 6 (1543), the judge was empowered to award a "*tales de circumstantibus*, of persons present in court, to be joined to the other jurors to try the cause." 3 W. Blackstone, *supra*, at *365. If the judge issued such a writ, the sheriff brought forward "talesmen" from

The presumptive openness of the jury selection process in England, not surprisingly, carried over into proceedings in colonial America. For example, several accounts noted the need for talesmen at the trials of Thomas Preston and William Wemms, two of the British soldiers who were charged with murder after the so-called Boston Massacre in 1770.[7] Public jury selection thus was the common practice in America when the Constitution was adopted.

B

For present purposes, how we allocate the "right" to openness as between the accused and the public, or whether we view it as a component inherent in the system benefiting both, is not crucial. No right ranks higher than the right of the accused to a fair trial. But the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend the *voir dire* which promotes fairness.

The open trial thus plays as important a role in the administration of justice today as it did for centuries before our separation from England. The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system. *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 569–571.

This openness has what is sometimes described as a "community therapeutic value." *Id.*, at 570. Criminal acts, es-

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among the bystanders in the courtroom. These talesmen were then subject to the same challenges as the others.

[7] 3 Legal Papers of John Adams 17, nn. 51, 52, 18 (1965) (Adams) (quoting William Palfrey to John Wilkes, Oct. 1770, in Elsey, John Wilkes and William Palfrey, 34 Col. Soc. Mass., *Pubns.* 411, 423–425 (1943)); 3 Adams 49, n. 9 (quoting Acting Governor Thomas Hutchinson in Additions to Hutchinson's History 32 (C. Mayo ed.)); 3 Adams 100.

pecially violent crimes, often provoke public concern, even outrage and hostility; this in turn generates a community urge to retaliate and desire to have justice done. See T. Reik, The Compulsion to Confess 288–295, 408 (1959). Whether this is viewed as retribution or otherwise is irrelevant. When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions. Proceedings held in secret would deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected. See *United States* v. *Hasting*, 461 U. S. 499, 507 (1983); *Morris* v. *Slappy*, 461 U. S. 1, 14–15 (1983). "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, *supra*, at 572. Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness.[8] In *Globe Newspaper Co.* v. *Superior Court*, 457 U. S. 596 (1982), we stated:

> "[T]he circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty

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[8] That for certain purposes, *e. g.*, double jeopardy, a trial begins when the first witness, *Wade* v. *Hunter*, 336 U. S. 684, 688 (1949), or the jurors, *Downum* v. *United States*, 372 U. S. 734 (1963), are sworn does not bear on the question presented here. The rules of attachment of jeopardy represent the broad perception that the Government's action has reached the point where its power to retrace its steps must be checked by the "countervailing interests of the individual protected by the double jeopardy clause of the fifth amendment." *United States* v. *Velazquez*, 490 F. 2d 29, 34 (CA2 1973); accord, *United States* v. *Jorn*, 400 U. S. 470, 480 (1971). By contrast, the question we address—whether the *voir dire* process must be open—focuses on First, rather than Fifth, Amendment values and the historical backdrop against which the First Amendment was enacted.

> one. Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Id.*, at 606–607.

The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered. We now turn to whether the presumption of openness has been rebutted in this case.

III

Although three days of *voir dire* in this case were open to the public, *six weeks* of the proceedings were closed, and media requests for the transcript were denied.[9] The Superior Court asserted two interests in support of its closure order and orders denying a transcript: the right of the defendant to a fair trial, and the right to privacy of the prospective jurors, for any whose "special experiences in sensitive areas . . . do not appear to be appropriate for public discussion." *Supra*, at 504. Of course the right of an accused to fundamental fairness in the jury selection process is a compelling interest. But the California court's conclusion that Sixth Amendment and privacy interests were sufficient to warrant prolonged closure was unsupported by findings showing that an open proceeding in fact threatened those interests;[10] hence it is not possible to conclude that closure was warranted.[11] Even with findings adequate to support closure, the trial court's orders denying access to *voir dire* testimony failed to consider whether alternatives were available to protect the interests of the prospective jurors that the trial court's orders sought to guard. Absent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire.*

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[9] We cannot fail to observe that a *voir dire* process of such length, in and of itself, undermines public confidence in the courts and the legal profession. The process is to ensure a fair impartial jury, not a favorable one. Judges, not advocates, must control that process to make sure privileges are not so abused. Properly conducted it is inconceivable that the process could extend over such a period. We note, however, that in response to questions counsel stated that it is not unknown in California courts for jury selection to extend six months.

The jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain.

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[10] We have previously noted that in some limited circumstances, closure may be warranted. Thus a trial judge may, "in the interest of the fair administration of justice, impose reasonable limitations on access to a trial. '[T]he question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge . . . the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places.'" *Richmond Newspapers*, 448 U. S., at 581–582, n. 18 (quoting *Cox* v. *New Hampshire*, 312 U. S. 569, 574 (1941)).

[11] Petitioner contends that respondent's closure order was based on the requirement in *Hovey* v. *Superior Court*, 28 Cal. 3d 1, 80, 616 P. 2d 1301 (1980), that jurors answer *voir dire* questions concerning juror death qualifications "outside the presence of . . . fellow venirepersons." *Id.*, at 81, 616 P. 2d, at 1354. The docket sheet merely states, however, that petitioner's motion to be admitted to jury *voir dire* "is denied and granted in part, as stated on the record." The transcript of hearing on the motion is unenlightening on this score. See App. 93. Thus, it is not clear that the judge's ruling was based on *Hovey*.

Assuming that *Hovey* was the basis for the trial court's order, it is unclear that the interests *Hovey* sought to protect could have justified respondent's closure order. In *Hovey*, the California Supreme Court focused on studies that indicated that jurors were prejudiced by the answers of other jurors during *voir dire*. There was no indication that the presence of the public or press affected jurors. The California Supreme Court in fact stated that its decision would not "in any way affect the open nature of a trial." 28 Cal. 3d, at 80–81, 616 P. 2d, at 1354.

The trial involved testimony concerning an alleged rape of a teenage girl. Some questions may have been appropriate to prospective jurors that would give rise to legitimate privacy interests of those persons. For example a prospective juror might privately inform the judge that she, or a member of her family, had been raped but had declined to seek prosecution because of the embarrassment and emotional trauma from the very disclosure of the episode. The privacy interests of such a prospective juror must be balanced against the historic values we have discussed and the need for openness of the process.

To preserve fairness and at the same time protect legitimate privacy, a trial judge must at all times maintain control of the process of jury selection and should inform the array of prospective jurors, once the general nature of sensitive questions is made known to them, that those individuals believing public questioning will prove damaging because of embarrassment, may properly request an opportunity to present the problem to the judge *in camera* but with counsel present and on the record.

By requiring the prospective juror to make an affirmative request, the trial judge can ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in privacy. This process will minimize the risk of unnecessary closure. The exercise of sound discretion by the court may lead to excusing such a person from jury service. When limited closure is ordered, the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time, if the judge determines that disclosure can be accomplished while safeguarding the juror's valid privacy interests. Even then a valid privacy right may rise to a level that part of the transcript should be sealed, or the name of a juror withheld, to protect the person from embarrassment.

The judge at this trial closed an incredible *six* weeks of *voir dire* without considering alternatives to closure. Later the court declined to release a transcript of the *voir dire* even while stating that "most of the information" in the transcript was "dull and boring." *Supra,* at 504. Those parts of the transcript reasonably entitled to privacy could have been sealed without such a sweeping order; a trial judge should explain why the material is entitled to privacy.

Assuming that some jurors had protectible privacy interests in some of their answers, the trial judge provided no explanation as to why his broad order denying access to information at the *voir dire* was not limited to information that was actually sensitive and deserving of privacy protection. Nor did he consider whether he could disclose the substance of the sensitive answers while preserving the anonymity of the jurors involved.

Thus not only was there a failure to articulate findings with the requisite specificity but there was also a failure to consider alternatives to closure and to total suppression of the transcript. The trial judge should seal only such parts of the transcript as necessary to preserve the anonymity of the individuals sought to be protected.

IV

The judgment of the Court of Appeal is vacated, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, concurring.

I agree that in this case the trial judge erred in closing the *voir dire* proceeding and in refusing to release a transcript of that proceeding without appropriate specific findings that nondisclosure was necessitated by a compelling governmental interest and was narrowly tailored to serve that interest. I write separately to emphasize my understanding that the Court does not decide, nor does this case require it to address, the asserted "right to privacy of the prospective jurors." *Ante*, at 510.

Certainly, a juror has a valid interest in not being required to disclose to all the world highly personal or embarrassing information simply because he is called to do his public duty. We need not decide, however, whether a juror, called upon to answer questions posed to him in court during *voir dire*, has a legitimate expectation, rising to the status of a privacy right, that he will not have to answer those questions. See *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 458 (1977); *Whalen* v. *Roe*, 429 U. S. 589, 599 (1977).[1]

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[1] As to most of the information sought during *voir dire*, it is difficult to believe that when a prospective juror receives notice that he is called to serve, he has an expectation, either actual or reasonable, that what he says in court will be kept private. Despite the fact that a juror does not put himself voluntarily into the public eye, a trial is a public event. See *Craig* v. *Harney*, 331 U. S. 367, 374 (1947). See also *Globe Newspaper Co.* v. *Superior Court*, 457 U. S. 596 (1982); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555 (1980); *Gannett Co.* v. *DePasquale*, 443 U. S. 368 (1979). And, as the Court makes clear today, *voir dire*, like the trial itself, is presumptively a public proceeding. The historical evidence indicates that *voir dire* has been conducted in public and most prospective jurors are aware that they will be asked questions during *voir dire* to determine whether they can judge impartially.

On other hand, courts have exercised their discretion to prevent unnecessarily intrusive *voir dire* questions. See *Sprouce* v. *Commonwealth*, 2 Va. Cas. 375 (1823) ("[In England] . . . the juror is not obliged to answer any question tending to fix infamy, or disgrace, on him . . ."); *Ryder* v. *State*, 100 Ga. 528, 535, 28 S. E. 246, 248 (1897) ("Certainly, neither the court nor counsel should ask any question which would involve a breach of the juror's privilege to refuse to answer on the ground that so doing would tend to incriminate, or otherwise disgrace, him"). More recent cases have relied, however, not on juror privacy, but on the trial judge's discretion to limit *voir dire* to protect juror safety or to prevent irrelevant questioning. See, *e. g.*, *United States* v. *Barnes*, 604 F. 2d 121, 140 (CA2 1979), cert. denied, 446 U. S. 907 (1980); *United States* v. *Taylor*, 562 F. 2d 1345, 1355 (CA2), cert. denied *sub nom. Salley* v. *United States*, 432 U. S. 909 (1977).

I am concerned that recognition of a juror's privacy "right" would unnecessarily complicate the lives of trial judges attempting to conduct a *voir dire* proceeding. Could a juror who disagreed with a trial judge's determination that he had no legitimate expectation of privacy in certain information refuse to answer without a promise of confidentiality until some superior tribunal declared his expectation unreasonable? Could a juror ever refuse to answer a highly personal, but relevant, question, on the ground that his privacy right outweighed the defendant's need to know? I pose these questions only to emphasize that we should not assume the existence of a juror's privacy right without considering carefully the implications of that assumption.

Nor do we need to rely on a privacy right to decide this case. No juror is now before the Court seeking to vindicate that right. Even assuming the existence of a juror's privacy right, the trial court erred in failing to articulate specific findings justifying the closure of the *voir dire* and the refusal to release the transcript. More important, as the trial court recognized, the defendant has an interest in protecting juror privacy in order to encourage honest answers to the *voir dire* questions.[2] The State has a similar interest in protecting juror privacy, even after the trial—to encourage juror honesty in the future—that almost always will be coextensive with the juror's own privacy interest. Thus, there is no need to determine whether the juror has a separate assertable constitutional right to prevent disclosure of his answers during *voir dire*. His interest in this case, and in most cases, can be fully protected through the interests of the defendant and the State in encouraging his full cooperation.

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[2] In closing the *voir dire* and in refusing to release the transcript, the trial court relied on both the defendant's right to a fair trial and a juror's right to privacy. It did not make clear whether it interpreted the California Supreme Court's decision in *Hovey* v. *Superior Court*, 28 Cal. 3d 1, 616 P. 2d 1301 (1980), to require closure, see *ante*, at 511, n. 11, or whether it concluded that the defendant had an additional interest in protecting juror privacy to encourage juror honesty. In any event, it concluded that the interests of the jurors and the defendant were consistent and that both required the protection of juror privacy.

With these qualifications, I join the Court's opinion. I agree that the privacy interest of a juror is a legitimate consideration to be weighed by a trial court in determining whether the public may be denied access to portions of a *voir dire* proceeding or to a transcript of that proceeding. I put off to another day consideration of whether and under what conditions that interest rises to the level of a constitutional right.

JUSTICE STEVENS, concurring.

The constitutional protection for the right of access that the Court upholds today is found in the First Amendment,[1] rather than the public trial provision of the Sixth.[2] If the defendant had advanced a claim that his Sixth Amendment right to a public trial was violated by the closure of the *voir dire*, it would be important to determine whether the selection of the jury was a part of the "trial" within the meaning of that Amendment. But the distinction between trials and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issues. Nor is our holding premised simply on our view as to how a criminal trial is most efficaciously conducted. For the question the Court decides today—"whether the *voir dire* process must be open—focuses on First . . . Amendment values and the historical backdrop against which the First Amendment was enacted." *Ante*, at 509, n. 8.

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[1] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

It is, of course, well settled that the Fourteenth Amendment makes this provision applicable to the abridgment of speech by the States, including state judges. See, *e. g., Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539 (1976).

[2] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." It was, of course, this Amendment that was construed in *Gannett Co.* v. *DePasquale*, 443 U. S. 368 (1979), a case holding that the defendant's right to a public trial cannot be asserted vicariously by persons who are not parties to the proceeding.

The focus commanded by the First Amendment makes it appropriate to emphasize the fact that the underpinning of our holding today is not simply the interest in effective judicial administration; the First Amendment's concerns are much broader. The "common core purpose of assuring freedom of communication on matters relating to the functioning of government," *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555, 575 (1980) (plurality opinion), that underlies the decision of cases of this kind provides protection to all members of the public "from abridgment of their rights of access to information about the operation of their government, including the Judicial Branch." *Id.*, at 584 (STEVENS, J., concurring). See also *id.*, at 587–588 (BRENNAN, J., concurring in judgment). As JUSTICE POWELL has written:

> "What is at stake here is the societal function of the First Amendment in preserving free public discussion of governmental affairs. No aspect of that constitutional guarantee is more rightly treasured than its protection of the ability of our people through free and open debate to consider and resolve their own destiny." *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 862 (1974) (dissenting opinion).[3]

This principle was endorsed by the Court in *Globe Newspaper Co.* v. *Superior Court*, 457 U. S. 596 (1982).

> "Underlying the First Amendment right of access to criminal trials is the common understanding that 'a major purpose of that Amendment was to protect the free dis-

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[3] It is worthy of note that the orderly development of First Amendment doctrine foreshadowed by JUSTICE POWELL's opinion in *Saxbe* almost certainly would have been delayed if *Gannett* had not been decided as it was.

> cussion of governmental affairs.' *Mills* v. *Alabama*, 384 U. S. 214, 218 (1966). By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." *Id.*, at 604.[4]

It follows that a claim to access cannot succeed unless access makes a positive contribution to this process of self-governance. Here, public access cannot help but improve public understanding of the *voir dire* process, thereby enabling critical examination of its workings to take place. It is therefore, I believe, entirely appropriate for the Court to identify the public interest in avoiding the kind of lengthy *voir dire* proceeding that is at issue in this case, *ante*, at 510, n. 9. Surely such proceedings should not be hidden from public view.[5]

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[4] See also *Houchins* v. *KQED, Inc.*, 438 U. S. 1, 30–32 (1978) (STEVENS, J., dissenting) (footnotes omitted):

"The preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment to the Constitution. . . .

"In addition to safeguarding the right of one individual to receive what another elects to communicate, the First Amendment serves an essential societal function. Our system of self-government assumes the existence of an informed citizenry. As Madison wrote:

"'A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy, or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.' 9 Writings of James Madison 103 (G. Hunt ed. 1910).

"It is not sufficient, therefore, that the channels of communication be free of governmental restraints. Without some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance."

[5] Of course, if this were a Sixth Amendment case, rather than a First Amendment case, and if the defendant had no objection to closure, the length of the *voir dire* would be irrelevant. Such is not the case under the rationale for today's decision.

The fact that this is a First Amendment case does not, of course, mean that the public's right of access is unlimited. Indeed, in other contexts in which the right of access has been implicitly endorsed, the Court has made this plain.[6] As the Court recognizes, the privacy interests of jurors may in some circumstances provide a basis for some limitation on the public's access to *voir dire*. *Ante*, at 511–513. See also *ante*, at 515–516 (BLACKMUN, J., concurring). The First Amendment source of the right of access to the *voir dire* examination should not preclude frank recognition of the need to examine the content of the censored communication in determining whether, and to what extent, it may remain private. When the process of drawing lines between what must be open and what may be closed begins, it will be necessary to identify at least some of the limits by reference to the subject matter of certain questions that arguably may probe into areas of privacy that are worthy of protection. Since that function can safely be performed without compromising the First Amendment's mission of securing meaningful public control over the process of governance, this form of regulation is not an abridgment of any First Amendment right. In this context, as in others, "a line may be drawn on the basis of content without violating the goverment's paramount obligation of neutrality in its regulation of protected communication." *Young* v. *American Mini Theaters, Inc.*, 427 U. S. 50, 70 (1976) (plurality opinion).[7]

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[6] In *Zemel* v. *Rusk*, 381 U. S. 1 (1965), the Court said: "The right to speak and publish does not carry with it the *unrestrained* right to gather information." *Id.*, at 17 (emphasis supplied). In *Branzburg* v. *Hayes*, 408 U. S. 665 (1972), after rejecting any suggestion "that news gathering does not qualify for First Amendment protection," *id.*, at 681, the Court held that the protection did not extend to a reporter's refusal to testify before a grand jury, at least under the facts of that case.

[7] See generally Farber, Content Regulation and the First Amendment: A Revisionist View, 68 Geo. L. J. 727 (1980); Redish, The Content Distinction in First Amendment Analysis, 34 Stan. L. Rev. 113 (1981); Schauer, Categories and the First Amendment: A Play in Three Acts, 34 Vand. L. Rev. 265, 282–296 (1981); Shiffrin, Defamatory Non-Media Speech and

In the case before us, as the Court correctly explains, there can be no doubt that the trial court applied an impermissibly broad rule of secrecy. Accordingly, I join the opinion of the Court.

JUSTICE MARSHALL, concurring in the judgment.

I agree with the result reached by the Court but write separately to stress that the constitutional rights of the public and press to access to all aspects of criminal trials are not diminished in cases in which "deeply personal matters" are likely to be elicited in *voir dire* proceedings. *Ante*, at 511. Indeed, the policies underlying those rights, see *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555, 572–573 (1980) (plurality opinion); *id.*, at 593–597 (BRENNAN, J., concurring in judgment), are most severely jeopardized when courts conceal from the public sensitive information that bears upon the ability of jurors impartially to weigh the evidence presented to them. Cf. *Globe Newspaper Co.* v. *Superior Court*, 457 U. S. 596, 606 (1982) ("Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process . . ."). Therefore, prior to issuing a closure order, a trial court should be obliged to show that the order in question constitutes *the least restrictive means available* for protecting compelling state interests. In those cases where a closure order is imposed, the constitutionally preferable method for reconciling the First Amendment interests of the public and the press with the legitimate privacy interests of jurors and the interests of defendants in fair trials is to redact transcripts in such a way as to preserve the anonymity of jurors while disclosing the substance of their responses. *Ante*, at 513. Only in the most extraordinary

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First Amendment Methodology, 25 UCLA L. Rev. 915, 942–963 (1978); Stephan, The First Amendment and Content Discrimination, 68 Va. L. Rev. 203 (1982); Note, Content Regulation and the Dimensions of Free Expression, 96 Harv. L. Rev. 1854 (1983).

circumstances can the substance of a juror's response to questioning at *voir dire* be permanently excluded from the salutary scrutiny of the public and the press.

Also, I feel compelled to note my strong disagreement with the Court's gratuitous comments concerning the length of *voir dire* proceedings in this and other cases. The Court's opinion states:

> "We cannot fail to observe that a *voir dire* process of such length [six weeks], in and of itself, undermines public confidence in the courts and the legal profession. The process is to ensure a fair impartial jury, not a favorable one. Judges, not advocates, must control that process to make sure privileges are not so abused. Properly conducted it is inconceivable that the process could extend over such a period. We note, however, that in response to questions counsel stated that it is not unknown in California courts for jury selection to extend six months." *Ante*, at 510, n. 9.

The question whether the *voir dire* proceedings in this case extended for too long a period is not before this Court. Not surprisingly, therefore, we know few of the facts that would be required to venture a confident ruling on that question. Some of the circumstances of which we are aware, however, cast considerable doubt on the majority's judgment. Albert Greenwood Brown, Jr., was accused of an interracial sexual attack and murder.[1] Given the history and continuing legacy of racism in our country, that fact alone should suggest that a greater than usual amount of inquiry may have been needed in order to obtain a fair and impartial jury in this case. I find it not at all "inconceivable" that the *voir dire* process could have legitimately extended over six weeks.

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[1] The criminal trial around which this suit revolves was one in which "the most serious and emotional of issues were presented—the rape and strangulation killing of a fifteen year old white schoolgirl on her way to school, by a black man twenty-six years of age, with a prior conviction of forcible rape on an adolescent caucasian girl." Brief for Joseph Peter Myers (trial counsel for Albert Greenwood Brown, Jr.) as *Amicus Curiae* 2.

Similarly, in the absence of facts not presently available to the Court, it is wrong to assume, as does the majority opinion, that a *voir dire* proceeding as elaborate and time-consuming as that which occurred in this case "in and of itself undermines public confidence in the courts and the legal profession." *Ibid.* After all, this was a *capital* case involving an interracial sexual attack that was bound to arouse a heightened emotional response from the affected community. In a situation of this sort, the public's response to the use of unusually elaborate procedures to protect the rights of the accused might well be, not lessened confidence in the courts, but rather heightened respect for the judiciary's unshakeable commitment to the ideal of due process even for persons accused of the most serious of crimes.[2]

Furthermore, in the absence of a claim that the length of *voir dire* proceedings violates federal law, this Court strays beyond its proper role when it lectures state courts on how best to structure such proceedings. We simply lack the authority to forbid state courts to devote what we might consider an inordinate amount of time to ensuring that a jury is unbiased.

For the foregoing reasons, I agree with the judgment but cannot join the opinion of the Court.

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[2] It is unlikely that there exists a public consensus regarding the proper contours of *voir dire* proceedings. Certainly there is a lack of consensus within the legal community. See, *e. g.*, *Ham* v. *South Carolina*, 409 U. S. 524 (1973). See also Babcock, Voir Dire: Preserving "Its Wonderful Power," 27 Stan. L. Rev. 545 (1975) (limiting *voir dire* examination undercuts the ability of litigants to utilize fully the right to a jury trial and works to the relative disadvantage of poor litigants who lack the resources to use other means to gather information about potential jurors).

DAILY INCOME FUND, INC., ET AL. *v.* FOX

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 82-1200. Argued November 7, 1983—Decided January 18, 1984

Respondent, a shareholder of petitioner Daily Income Fund, Inc. (Fund), an open-end diversified management investment company regulated by the Investment Company Act of 1940 (Act), filed suit in Federal District Court against both the Fund and petitioner Reich & Tang, Inc. (R&T), which provides the Fund with investment advice and management services. Respondent alleged that fees paid to R&T by the Fund were unreasonable, in violation of § 36(b) of the Act, which imposes a fiduciary duty on an investment company's adviser "with respect to the receipt of compensation for services" paid by the company and provides that "[a]n action may be brought under this subsection by the [Securities and Exchange] Commission, or by a security holder of such registered investment company on behalf of such company" against the adviser and other affiliated parties. The complaint sought damages in favor of the Fund as well as payment of respondent's costs, expenses, and attorney's fees. The District Court dismissed the suit, finding that § 36(b) actions are subject to the "demand requirement" of Federal Rule of Civil Procedure 23.1—which governs "a derivative action brought by one or more shareholders . . . to enforce a right of a corporation [when] the corporation [has] failed to enforce a right which may properly be asserted by it" and requires a shareholder bringing such a suit to allege his efforts, if any, to obtain the desired action from the directors and the reasons for his failure to obtain or request such action—and that respondent had not complied with the Rule. The Court of Appeals reversed.

Held: Rule 23.1 does not apply to an action brought by an investment company shareholder under § 36(b), and thus the plaintiff in such a case need not first make a demand upon the company's directors before bringing suit. Pp. 527-542.

(a) The term "derivative action," which defines the scope of Rule 23.1, applies only to those actions in which the right claimed by the shareholder is one the corporation itself could have enforced in court. This interpretation of the Rule is consistent with earlier decisions (*e. g.*, *Hawes* v. *Oakland*, 104 U. S. 450, from which the Rule's provisions were derived) and is supported by its purpose of preventing shareholders from improperly suing in place of a corporation. Pp. 527-534.

(b) The right asserted by a shareholder suing under § 36(b) cannot be judicially enforced by the investment company. Instead of establishing a corporate action from which a shareholder's right to sue derivatively may be inferred, § 36(b) expressly provides only that the new corporate right it creates may be enforced by the Securities and Exchange Commission and security holders of the company. Moreover, an investment company does not have an implied right of action under § 36(b). Consideration of pertinent factors—the statute's legislative history and purposes, the identity of the class for whose particular benefit the statute was passed, the existence of express statutory remedies adequate to serve the legislative purpose, and the traditional role of the States in affording the relief claimed—plainly demonstrates that Congress intended the unique right created by § 36(b) to be enforced solely by the Commission and security holders of the investment company. Pp. 534–541.

692 F. 2d 250, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 542.

Daniel A. Pollack argued the cause for petitioners. With him on the briefs were *Frederick P. Schaffer*, *George C. Seward*, and *Anthony R. Mansfield*.

Richard M. Meyer argued the cause and filed a brief for respondent.*

JUSTICE BRENNAN delivered the opinion of the Court.

The question for decision is whether Rule 23.1 of the Federal Rules of Civil Procedure requires that an investment company security holder first make a demand upon the company's board of directors before bringing an action under § 36(b) of the Investment Company Act of 1940 to recover allegedly excessive fees paid by the company to its investment adviser. The Court of Appeals for the Second Circuit held in this case that the demand requirement of Rule 23.1 does not apply to such actions. *Fox* v. *Reich & Tang, Inc.*, 692 F. 2d 250 (1982). Two other Courts of Appeals have reached a contrary conclusion.[1] We granted certiorari to resolve the conflict, 460 U. S. 1021 (1983), and now affirm.

**Harvey L. Pitt* filed a brief for the Investment Company Institute as *amicus curiae* urging reversal.

Solicitor General Lee, *Deputy Solicitor General Claiborne*, *Samuel A. Alito, Jr.*, *Daniel L. Goelzer*, *Paul Gonson*, *Jacob H. Stillman*, *Richard A. Kirby*, and *Myrna Siegel* filed a brief for the Securities and Exchange Commission as *amicus curiae* urging affirmance.

I

Respondent is a shareholder of petitioner Daily Income Fund, Inc. (Fund), an open-end diversified management investment company, or "mutual fund," regulated by the Investment Company Act of 1940 (ICA or Act), 15 U. S. C. § 80a–1 *et seq.* (1982 ed.). The Fund invests in a portfolio of short-term money market instruments with the aim of achieving high current income while preserving capital. Under a written contract, petitioner Reich & Tang, Inc. (R&T), provides the Fund with investment advice and other management services in exchange for a fee currently set at one-half of one percent of the Fund's net assets. From 1978 to 1981, the Fund experienced substantial growth; its net assets increased from about $75 million to $775 million. During this period, R&T's fee of one-half of one percent of net assets remained the same. Accordingly, annual payments by the Fund to R&T rose from about $375,000 to an estimated $3,875,000 in 1981.

Alleging that these fees were unreasonable, respondent brought this action in the United States District Court for the Southern District of New York, naming both the Fund and R&T as defendants. The complaint alleged that, because the Fund's assets had been continually reinvested in a limited number of instruments, R&T's investment decisions had remained routine and substantially unchanged as the Fund grew. By receiving significantly higher fees for essentially the same services, R&T had, according to respondent, violated the fiduciary duty owed investment companies by their advisers under §36(b) of the ICA. Pub. L. 91–547, §20, 84 Stat. 1428, 15 U. S. C. §80a–35(b) (1982 ed.).[2] The complaint sought damages in favor of the Fund as well as payment of respondent's costs, expenses, and attorney's fees.

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[1] *Weiss* v. *Temporary Investment Fund, Inc.*, 692 F. 2d 928 (CA3 1982), cert. pending, No. 82–1592; *Grossman* v. *Johnson*, 674 F. 2d 115 (CA1), cert. denied, 459 U. S. 838 (1982).

Petitioners moved to dismiss the suit for failure to comply with Federal Rule of Civil Procedure 23.1, which governs "a derivative action brought by one or more shareholders . . . to enforce a right of a corporation . . . , the corporation . . . having failed to enforce a right which may properly be asserted by it . . . ." The Rule requires a shareholder bringing such a suit to set forth "the efforts, if any, made by the plaintiff to obtain the action he desires from the directors . . . , and the reasons for his failure to obtain the action or for not making the effort."[3] Respondent contended that the

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[2] Section 36(b) of the ICA provides, in relevant part:

"For the purposes of this subsection, the investment adviser of a registered investment company shall be deemed to have a fiduciary duty with respect to the receipt of compensation for services, or of payments of a material nature, paid by such registered investment company or by the security holders thereof, to such investment adviser or any affiliated person of such investment adviser. An action may be brought under this subsection by the Commission, or by a security holder of such registered investment company on behalf of such company, against such investment adviser, or any affiliated person of such investment adviser, or any other person enumerated in subsection (a) of this section who has a fiduciary duty concerning such compensation or payments, for breach of fiduciary duty in respect of such compensation or payments paid by such registered investment company or by the security holders thereof to such investment adviser or person." 15 U. S. C. §80a–35(b) (1982 ed.).

Section 36(b) goes on to provide, *inter alia*, that proof of a defendant's misconduct is unnecessary, §80a–35(b)(1), that approval by the board of directors or shareholders of the adviser's compensation "shall be given such consideration by the court as is deemed appropriate under all the circumstances," §80a–35(b)(2), and that recovery is limited to actual damages for a period of one year prior to suit, §80a–35(b)(3).

[3] Rule 23.1 provides in full:

"In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1)

Rule 23.1 "demand requirement" does not apply to actions brought under § 36(b) of the ICA and that, in any event, demand was excused because the Fund's directors had participated in the alleged wrongdoing and would be hostile to the suit. The District Court, finding Rule 23.1 applicable to § 36(b) actions and finding no excuse based on the directors' possible self-interest or bias, dismissed the action. *Fox* v. *Reich & Tang, Inc.*, 94 F. R. D. 94 (1982).

The Court of Appeals reversed. *Fox* v. *Reich & Tang, Inc.*, 692 F. 2d 250 (1982). The court concluded that Rule 23.1 by its terms applies only when the corporation could itself "'assert,' in a court, the same action under the same rule of law on which the shareholder plaintiff relies." *Id.*, at 254. Relying on both the language and the legislative history of § 36(b), the court determined that an investment company may not itself sue under that section to recover excessive adviser fees. *Id.*, at 254–261. Accordingly, the court held that Rule 23.1 does not apply to actions by security holders brought under § 36(b). *Id.*, at 261.

II

Although any action in which a shareholder asserts the rights of a corporation could be characterized as "derivative,"

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that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would otherwise not have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs."

see n. 11, *infra*, Rule 23.1 applies in terms only to a "derivative action brought by one or more shareholders or members to enforce a right of a corporation [when] the corporation [has] *failed to enforce a right which may properly be asserted by it*" (emphasis added). This qualifying language suggests that the type of derivative action governed by the Rule is one in which a shareholder claims a right that could have been, but was not, "asserted" by the corporation in court. The "right" mentioned in the emphasized phrase, which cannot sensibly mean any right without limitation, is most naturally understood as referring to the same right, or at least its substantial equivalent, as the one asserted by the plaintiff shareholder. And, in the context of a rule of judicial procedure, the reference to the corporation's "failure to enforce a right which may properly be asserted by it" obviously presupposes that the right in question could be enforced by the corporation in court.

This interpretation of the Rule is consistent with the understanding we have expressed, in a variety of contexts, of the term "derivative action." In *Hawes* v. *Oakland*, 104 U. S. 450, 460 (1882), for instance, the Court explained that a derivative suit is one "founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff." Similarly, *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 548 (1949), stated that a derivative action allows a stockholder "to step into the corporation's shoes and to seek in its right the restitution he could not demand in his own"; and the Court added that such a stockholder "brings suit on a cause of action derived from the corporation." *Id.*, at 549. Finally, *Ross* v. *Bernhard*, 396 U. S. 531, 534 (1970), described a derivative action as "a suit to enforce a *corporate* cause of action against officers, directors, and third parties" (emphasis in original) and viewed the question there presented—whether the Seventh Amendment confers a right to a jury in such an action—as the same as whether the corporation, had it brought the suit itself, would be entitled to a jury. *Id.*, at 538–539. In sum, the term "derivative action," which defines the scope of Rule 23.1, has long been understood to apply only to those actions in which the right claimed by the shareholder is one the corporation could itself have enforced in court. See also *Koster* v. *Lumbermens Mutual Casualty Co.*, 330 U. S. 518, 522 (1947); *Price* v. *Gurney*, 324 U. S. 100, 105 (1945); *Delaware & Hudson Co.* v. *Albany & Susquehanna R. Co.*, 213 U. S. 435, 447 (1909).[4]

The origin and purposes of Rule 23.1 support this understanding of its scope. The Rule's provisions derive from this Court's decision in *Hawes* v. *Oakland*, *supra.* Prior to *Hawes*, federal courts exercising their equity powers had commonly entertained suits by minority stockholders to enforce corporate rights in circumstances where the corporation had failed to sue on its own behalf. *Id.*, at 452. See *Dodge* v. *Woolsey*, 18 How. 331, 339 (1856); 7A C. Wright & A. Miller, Federal Practice and Procedure § 1821, pp. 296–

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[4] One commentator has explained that "the derivative suit may be viewed as the consolidation in equity of, on the one hand, a suit by the shareholder against the directors in their official capacity, seeking an affirmative order that they sue the alleged wrongdoers, and, on the other, a suit by the corporation against these wrongdoers." Note, Demand on Directors and Shareholders as a Prerequisite to a Derivative Suit, 73 Harv. L. Rev. 746, 748 (1960). The Court in *Hawes* embraced this conception of the suit as consolidating "two causes of action," 104 U. S., at 452, and referred throughout its opinion to a derivative action as "one in which the right of action [is] in the company," *id.*, at 455; see *id.*, at 457 (cases impose limits on "the right of a stockholder to sue in cases where the corporation is the proper party to bring the suit"). See also *Corbus* v. *Alaska Treadwell Gold Mining Co.*, 187 U. S. 455, 463 (1903) (describing rules governing derivative suits as limiting situations in which "a court of equity may . . . be called upon at the appeal of any single stockholder to compel the directors of the corporation to enforce every right which it may possess, irrespective of other considerations"); Black's Law Dictionary 1272 (5th ed., 1979).

297 (1972). The Court in *Hawes*, while emphasizing the importance of such suits as a means of "protecting the stockholder against the frauds of the governing body of directors or trustees," 104 U. S., at 453, noted that this equitable device was subject to two kinds of potential abuse. First, corporations that were engaged in disputes with citizens of their home State could collude with out-of-state stockholders to obtain diversity jurisdiction in order to litigate the dispute in the federal courts. *Id.*, at 452–453. Second, derivative actions brought by minority stockholders could, if unconstrained, undermine the basic principle of corporate governance that the decisions of a corporation—including the decision to initiate litigation—should be made by the board of directors or the majority of shareholders. See *id.*, at 454–457.

To address these problems, the Court in *Hawes* established a number of prerequisites to bringing derivative suits in the federal courts. These requirements were designed to limit the use of the device to situations in which, due to an unjustified failure of the corporation to act for itself, it was appropriate to permit a shareholder "to institute and conduct a litigation which usually belongs to the corporation." *Id.*, at 460. With some additions and changes in wording, the conditions set out in *Hawes* have been carried forward in successive revisions of the federal rules.[5]

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[5] Shortly after *Hawes* was decided, the Court codified its requirements in Equity Rule 94, which provided:

"Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law; and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on

Some of the requirements first announced in *Hawes* were intended to reduce the burden on the federal courts by diverting corporate causes of action "to the State courts, which are their natural, their lawful, and their appropriate forum." *Id.*, at 452–453.[6] At the same time, however, the Court sought to maintain derivative suits as a limited exception to the usual rule that the proper party to bring a claim on behalf of a corporation is the corporation itself, acting

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the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action." 104 U. S. ix–x (1882).

In 1912, the Court replaced the original Rule with Equity Rule 27, identical to its predecessor except that it added at the very end the phrase "or the reasons for not making such effort." 226 U. S., Appendix, p. 8. This language was apparently intended to codify a judicially recognized exception to the old Rule in certain circumstances where, in the discretion of the court, a demand may be excused. See *Delaware & Hudson Co.* v. *Albany & Susquehanna R. Co.*, 213 U. S. 435 (1909).

When the Federal Rules were promulgated in 1937, the provisions of Equity Rule 27 were substantially restated in Rule 23(b). See 3B J. Moore & J. Kennedy, Moore's Federal Practice ¶ 23.1.15[1], p. 23.1–10 (2d ed. 1982). Finally, in 1966, the present version of new Rule 23.1 was adopted as part of a comprehensive revision of the Rules governing class actions. See *id.*, ¶ 23.1.01, p. 23.1–3.

[6] In particular, the Court required the complaint in a derivative suit to allege that the plaintiff "was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it could otherwise have no cognizance . . . ." 104 U. S., at 461. The second of these requirements was clearly meant to discourage efforts to bring disputes between a company and citizens of the State of incorporation within the diversity jurisdiction of the federal courts. See *supra*, at 530; 3B J. Moore & J. Kennedy, *supra*, ¶ 23.1.15[1], p. 23.1–14. Although the first requirement may also have been intended to discourage contrived diversity suits, see *id.*, ¶ 23.1.15[1], p. 23.1–15, it is now understood as generally "aimed at preventing the federal courts from being used to litigate purchased grievances." 7A C. Wright & A. Miller, Federal Practice and Procedure § 1828, pp. 341–342 (1972).

through its directors or the majority of its shareholders. *Id.*, at 460–461. As the Court later explained, this aspect of the rules governing derivative suits reflects the basic policy that "[w]hether or not a corporation shall seek to enforce in the courts a cause of action for damages is, like other business questions, ordinarily a matter of internal management and is left to the discretion of the directors, in the absence of instruction by vote of the stockholders." *United Copper Securities Co.* v. *Amalgamated Copper Co.*, 244 U. S. 261, 263 (1917). See also *Corbus* v. *Alaska Treadwell Gold Mining Co.*, 187 U. S. 455, 463 (1903).[7]

The principal means by which the Court in *Hawes* sought to vindicate this policy was, of course, its requirement that a shareholder seek action by the corporation itself before bringing a derivative suit. 104 U. S., at 460–461.[8] This

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[7] Like the requirements adopted in *Hawes*, the two major features of Rule 23.1 added since that decision—the requirement that the plaintiff "fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association" and the provision requiring notice and court approval of settlements—are also intended to prevent shareholders from suing in place of the corporation in circumstances where the action would disserve the legitimate interests of the company or its shareholders. See generally 7A C. Wright & A. Miller, *supra*, §§ 1833 and 1839; 3B J. Moore & J. Kennedy, *supra*, ¶¶ 23.1.16[3] and 23.1.24.

[8] Although the Court in *Hawes* imposed a direct requirement that shareholders make demand on directors before bringing suit, 104 U. S., at 460–461, Rule 23.1 as presently written requires only that a shareholder's "complaint shall also allege with particularity the efforts, *if any*, made by the plaintiff to obtain the action he desires from the directors or comparable authority . . ." (emphasis added). Relying on the emphasized qualification, added to the Rule without comment by the drafters in 1966, see n. 5, *supra*, the Securities and Exchange Commission (SEC), appearing as *amicus curiae*, contends that the Rule does not itself oblige the shareholder to make a demand; instead, it simply requires the plaintiff to plead compliance with applicable obligations of substantive law, ordinarily that of the State of incorporation. See *Burks* v. *Lasker*, 441 U. S. 471, 478 (1979). Because we conclude that a suit brought under § 36(b) of the ICA is not a "derivative action" for purposes of Rule 23.1, see *infra*, at 542, we need not

"demand requirement" affords the directors an opportunity to exercise their reasonable business judgment and "waive a legal right vested in the corporation in the belief that its best interests will be promoted by not insisting on such right. They may regard the expense of enforcing the right or the furtherance of the general business of the corporation in determining whether to waive or insist upon the right." *Corbus* v. *Alaska Treadwell Gold Mining Co.*, *supra*, at 463. On the other hand, if, in the view of the directors, "litigation is appropriate, acceptance of the demand places the resources of the corporation, including its information, personnel, funds, and counsel, behind the suit." Note, The Demand and Standing Requirements in Stockholder Derivative Actions, 44 U. Chi. L. Rev. 168, 171–172 (1976) (footnote omitted). Like the Rule in general, therefore, the provisions regarding demand assume a lawsuit that could be controlled by the corporation's board of directors.[9]

In sum, the conceptual basis and purposes of Rule 23.1 confirm what its language suggests: the Rule governs only suits "to enforce a right of a corporation" when the corpora-

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decide whether the Rule itself, as a matter of federal procedure, makes demand on directors the predicate to a proper derivative suit in federal courts or whether any such obligation must instead be found in applicable substantive law.

[9] Petitioners point out that, even in cases where the corporation could not control the shareholder's lawsuit, a demand on directors affords management an opportunity to pursue nonjudicial remedies for the shareholder's grievance. But however desirable the encouragement of intracorporate remedies may be as a matter of policy, it is not, standing alone, enough to make a suit that the corporation can neither initiate nor terminate a "derivative action" within the meaning of Rule 23.1. Such a suit does not come within the Rule's language as it is most naturally interpreted and as we have consistently understood it. See *supra*, at 527–529. Moreover, the Rule and its predecessors were directed at ensuring that the proper party was before the court in a certain class of cases, see *supra*, at 529–533, and a shareholder action that the corporation cannot control raises no proper party concerns.

tion itself has "failed to enforce a right which may properly be asserted by it" in court. In this case, therefore, we must decide whether the right asserted by a shareholder suing under § 36(b) of the ICA could be judicially enforced by the investment company.[10] We turn to consider that question.

III

In determining whether § 36(b) confers a right that could be judicially enforced by an investment company, we look first, of course, at the language of the statute. As noted in n. 2, *supra*, § 36(b) imposes a fiduciary duty on an investment company's adviser "with respect to the receipt of compensation for services" paid by the company and provides that "[a]n action may be brought under this subsection by the [Securities and Exchange] Commission, or by a security holder of such registered investment company on behalf of such company" against the adviser and other affiliated parties. By its terms, then, the unusual cause of action created by § 36(b) differs significantly from those traditionally asserted in shareholder derivative suits. Instead of establishing a corporate action from which a shareholder's right to sue derivatively may be inferred, § 36(b) expressly provides only that the new corporate right it creates may be enforced by the Securities and Exchange Commission (SEC) and security holders of the company.[11]

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[10] Petitioners contend that, even if an investment company could not bring a suit under § 36(b), a shareholder's action under that section is nevertheless derivative for purposes of Rule 23.1 because the investment company has a similar right to recover excessive fees from its investment adviser under a state-law cause of action for corporate waste. See, *e. g.*, *Llewellyn* v. *Queen City Dairy, Inc.*, 187 Md. 49, 57–58, 48 A. 2d 322, 326 (1946). The fact that the corporation may be able to achieve some of the results contemplated by § 36(b) under state law does not, however, demonstrate that a shareholder's action brought under an independent federal statute claims "a right which may properly be asserted" by the corporation. See *supra*, at 527–529. The new right created by § 36(b) is not only formally distinct from that asserted in a state claim of corporate waste; it is substantively different as well. Indeed, an important reason for the enactment of § 36(b) was Congress' belief that the standards applied in corporate waste actions were inadequate to ensure reasonable adviser fees. As the Senate Committee that reported the bill that became § 36(b) explained:

"Under general rules of law, advisory contracts which are ratified by the shareholders, or in some States approved by a vote of the disinterested directors, may not be upset in the courts except upon a showing of 'corporate waste.' As one court put it, the fee must 'Shock the conscience of the court.' Such a rule may not be an improper one when the protections of arm's-length bargaining are present. But in the mutual fund industry where . . . these marketplace forces are not likely to operate as effectively, your committee has decided that the standard of 'corporate waste' is unduly restrictive and recommends that it be changed." S. Rep. No. 91–184, p. 5 (1969).

See *infra*, at 540, and n. 12.

Petitioners nevertheless contend that an investment company has an implied right of action under § 36(b). In evaluating such a claim, our focus must be on the intent of Congress when it enacted the statute in question. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 377–378 (1982). That intent may in turn be discerned by examining a number of factors, including the legislative history and purposes of the statute, the identity of the class for whose particular benefit the statute was passed, the existence of express statutory remedies adequate to serve the legislative purpose, and the traditional role of the States in affording the relief claimed. *Ibid.*; *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 13–15 (1981); *California* v. *Sierra Club*, 451 U. S. 287, 292–293 (1981); *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979); *Cort* v. *Ash*, 422 U. S. 66, 78 (1975). In this case, consideration of each of these factors plainly demonstrates that Congress intended the unique right created by § 36(b) to be enforced solely by the SEC and security holders of the investment company.

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[11] Petitioners argue that, because § 36(b) provides for an action "by a security holder of such registered investment company *on behalf of such company*" (emphasis added), such an action is necessarily derivative. In this regard, petitioners rely on this Court's statement in *Burks* v. *Lasker*, 441 U. S., at 477, that a "derivative suit is brought by shareholders to enforce a claim *on behalf of* the corporation" (emphasis added). See also *id.*, at 484 (referring to actions brought under § 36(b) as "derivative"). The fact that derivative suits are brought on behalf of a corporation does not mean, however, that all suits brought on behalf of a corporation are derivative. The "on behalf" language in § 36(b) indicates only that the right asserted by a shareholder suing under the statute is a "right of the corporation"—a proposition confirmed by other aspects of the action: The fiduciary duty imposed on advisers by § 36(b) is owed to the company itself as well as its shareholders and any recovery obtained in a § 36(b) action will go to the company rather than the plaintiff. See S. Rep. No. 91–184, *supra*, at 6; § 36(b)(3). In this respect, a § 36(b) action is undeniably "derivative" in the broad sense of that word. See *supra*, at 527–528. As we have noted, however, Rule 23.1 applies by its terms only to "a derivative action brought by one or more shareholders . . . to enforce a right of a corporation [when] the corporation [has] *failed to enforce a right which may properly be asserted by it*" (emphasis added). The legislative history of § 36(b) makes clear that Congress intended the perhaps unique "right of a corporation" established by § 36(b) to be asserted by the company's security holders and not by the company itself. *Infra*, at 536–541.

As we have previously noted, Congress adopted the ICA because of its concern with "the potential for abuse inherent in the structure of investment companies." *Burks* v. *Lasker*, 441 U. S. 471, 480 (1979). Unlike most corporations, an investment company is typically created and managed by a pre-existing external organization known as an investment adviser. *Id.*, at 481. Because the adviser generally supervises the daily operation of the fund and often selects affiliated persons to serve on the company's board of directors, the "'relationship between investment advisers and mutual funds is fraught with potential conflicts of interest.'" *Ibid.*, quoting *Galfand* v. *Chestnutt Corp.*, 545 F. 2d 807, 808 (CA2 1976). In order to minimize such conflicts of interest, Congress established a scheme that regulates most transactions between investment companies and their advisers, 15 U. S. C. § 80a–17 (1982 ed.); limits the number of persons affiliated with the adviser who may serve on the fund's board of directors, § 80a–10; and requires that fees for investment advice and other services be governed by a written contract approved both by the directors and the shareholders of the fund, § 80a–15.

In the years following passage of the Act, investment companies enjoyed enormous growth, prompting a number of studies of the effectiveness of the Act in protecting investors. One such report, commissioned by the SEC, found that investment advisers often charged mutual funds higher fees than those charged the advisers' other clients and further determined that the structure of the industry, even as regulated by the Act, had proved resistant to efforts to moderate adviser compensation. Wharton School Study of Mutual Funds, H. R. Rep. No. 2274, 87th Cong., 2d Sess., 28–30, 34, 66–67 (1962). Specifically, the study concluded that the unaffiliated directors mandated by the Act were "of restricted value as an instrument for providing effective representation of mutual fund shareholders in dealings between the fund and its investment adviser." *Id.*, at 34. A subsequent report, authored by the SEC itself, noted that investment advisers were generally compensated on the basis of a fixed percentage of the fund's assets, rather than on services rendered or actual expenses. Securities and Exchange Commission, Public Policy Implications of Investment Company Growth, H. R. Rep. No. 2337, 89th Cong., 2d Sess., 89 (1966) (hereinafter SEC Report). The Commission determined that, as a fund's assets grew, this form of payment could produce unreasonable fees in light of the economies of scale realized in managing a larger portfolio. *Id.*, at 94, 102. Furthermore, the Commission concluded that lawsuits by security holders challenging the reasonableness of adviser fees had been largely ineffective due to the standards employed by courts to judge the fees. *Id.*, at 132–143. See *infra*, at 540, and n. 12.

In order to remedy this and other perceived inadequacies in the Act, the SEC submitted a series of legislative proposals to Congress that led to the 1970 Amendments to the

Act. Some of the proposals Congress ultimately adopted were intended to make the fund's board of directors more independent of the adviser and to encourage greater scrutiny of adviser contracts. See, *e. g.*, 15 U. S. C. § 80a–10(a) (1982 ed.) (requiring that at least 40% of the directors not be "interested persons," a broader category than the previously identified group of persons "affiliated" with the adviser, see § 80a–2(a)(19)); § 80a–15(c) (requiring independent directors as well as shareholders to approve adviser contracts); *Burks* v. *Lasker*, *supra*, at 482–483. The SEC had, however, determined that approval of adviser contracts by shareholders and independent directors could not alone provide complete protection of the interests of security holders with respect to adviser compensation. See SEC Report, at 128–131, 144, 146–147. Accordingly, the Commission also proposed amending the Act to require "reasonable" fees. *Id.*, at 143–147. As initially considered by Congress, the bill containing this proposal would have empowered the SEC to bring actions to enforce the reasonableness standard and to intervene in any similar action brought by or on behalf of the company. H. R. 9510, 90th Cong., 1st Sess., § 8(d) (1967); S. 1659, 90th Cong., 1st Sess., § 8(d) (1967).

Representatives of the investment company industry, led by *amicus* Investment Company Institute (ICI), expressed concern that enabling the SEC to enforce the fairness of adviser fees might in essence provide the Commission with ratemaking authority. Accordingly, ICI proposed an alternative to the SEC bill which would have provided that actions to enforce the reasonableness standard "be brought only by the company or a security holder thereof on its behalf." Mutual Fund Legislation of 1967: Hearings on S. 1659 before the Senate Committee on Banking and Currency, 90th Cong., 1st Sess., pt. 1, pp. 100–101 (1967) (hereinafter 1967 Hearings). The version that the Senate finally passed, however, rejected the industry's suggestion that the investment company itself be expressly authorized to bring suit. S. 3724, 90th Cong., 2d Sess., § 8(d)(6) (1968). Instead, the Senate bill required a security holder to make demand on the SEC before bringing suit and provided that, if the Commission refused or failed to bring an action within six months, the security holder could maintain a suit against the adviser in a "derivative" or representative capacity. *Ibid.* Like the original SEC proposal, however, the Senate bill provided that the SEC could intervene in any action brought by the company or by a security holder on its behalf. *Id.*, § 22.

After the bill was reintroduced in the 91st Congress, further hearings and consultations with the industry led to the present version of § 36(b). See S. 2224, 91st Cong., 1st Sess., § 20(b) (1969); 115 Cong. Rec. 13648 (1969) (statement of Sen. McIntyre). The new version adopted "a different method of testing management compensation." S. Rep. No. 91–184, p. 5 (1969). Instead of containing a statutory standard of "reasonableness," the new version imposed a "fiduciary duty" on investment advisers. *Id.*, at 5–6. The new bill further provided that "either the SEC or a shareholder may sue in court on a complaint that a mutual fund's management fees involve a breach of fiduciary duty." *Id.*, at 7. The reference in the previous bill to the derivative or representative nature of the security holder action was eliminated, as was the earlier provision for intervention by the SEC in actions brought by the investment company itself. See S. 2224, *supra*, § 22.

In short, Congress rejected a proposal that would have expressly made the statutory standard governing adviser fees enforceable by the investment company itself and adopted in its place a provision containing none of the indications in earlier drafts that the company could bring such a suit. This legislative history strongly suggests that, in adopting § 36(b), Congress did not intend to create an implied right of action in favor of the investment company.

That conclusion is further supported by the purposes of the statute. As noted above, the SEC proposed the predecessor to § 36(b) because of its concern that the structural requirements for investment companies imposed by the Act would not alone ensure reasonable adviser fees. See *supra*, at 538. Indeed, the Commission concluded that the Act's provisions for independent directors and approval of adviser contracts had actually frustrated effective challenges to adviser fees. In particular, the Commission noted that in the three fully litigated cases in which security holders had attacked such fees under state law, the courts had relied on the approval of adviser contracts by security holders or unaffiliated directors to uphold the fees. SEC Report, at 132–143.[12] For this reason, the Senate Report proposing the final version of the statute noted that, while shareholder and directorial approval of the adviser's contract is entitled to serious consideration by the court in a § 36(b) action, "such consideration would not be controlling in determining whether or not the fee encompassed a breach of fiduciary duty." S. Rep. No. 91–184, at 15; see *id.*, at 5. In contrast to its approach in other aspects of the 1970 Amendments, then, Congress decided not to rely solely on the fund's directors to assure reasonable adviser fees, notwithstanding the increased disinterestedness of the board. See *Burks* v. *Lasker*, 441 U. S., at 481–482, n. 10, and 484. See also SEC Report, at 146–148 (right of SEC and security holders to bring actions essential; although role of disinterested directors should be enhanced,

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[12] In the three cases cited by the SEC, the courts had evaluated the adviser contracts according to common-law standards of corporate waste, under which an unreasonable or unfair fee might be approved unless the court deemed it "unconscionable" or "shocking." SEC Report, at 142. See *Acampora* v. *Birkland*, 220 F. Supp. 527, 548–549 (Colo. 1963); *Saxe* v. *Brady*, 40 Del. Ch. 474, 486, 184 A. 2d 602, 610 (1962); *Meiselman* v. *Eberstadt*, 39 Del. Ch. 563, 567–568, 170 A. 2d 720, 723 (1961). Similarly, security holders challenging adviser fees under the ICA itself had been required to prove gross abuse of trust. See *Brown* v. *Bullock*, 194 F. Supp. 207 (SDNY), aff'd, 294 F. 2d 415 (CA2 1961). See 1967 Hearings, at 117–118.

"even a requirement that all of the directors of an externally managed investment company be persons unaffiliated with the company's adviser-underwriter would not be an effective check on advisory fees and other forms of management compensation"). This policy choice strongly indicates that Congress intended security holder and SEC actions under § 36(b), on the one hand, and directorial approval of adviser contracts, on the other, to act as independent checks on excessive fees.

Nor do other factors on which we have relied to identify an implied cause of action support petitioners' claim that the right asserted by a shareholder in a § 36(b) action could be enforced by the investment company. First, investment companies, as well as the investing public, are undoubtedly within "the class for whose *especial* benefit" § 36(b) was enacted, *Cort* v. *Ash*, 422 U. S., at 78 (emphasis in original); see n. 11, *supra*. Section § 36(b)'s express provision for actions by security holders, however, ensures that, even if the company's directors cannot bring an action in the fund's name, the company's rights under the statute can be fully vindicated by plaintiffs authorized to act on its behalf. For this reason, it is unnecessary to infer a right of action in favor of the corporation in order to serve the statute's "broad remedial purposes." Cf. *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 386–387 (1983). See also *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S., at 13–15. Second, because § 36(b) creates an entirely new right, it was obviously not enacted "in a statutory context in which an implied private remedy [had] already been recognized by the courts." Cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S., at 378; *Herman & MacLean* v. *Huddleston*, *supra*, at 384–386. Third, a corporation's rights against its directors or third parties with whom it has contracted are generally governed by state, not federal, law. *Burks* v. *Lasker*, *supra*, at 478. See *Cort* v. *Ash*, *supra*, at 78.

IV

A shareholder derivative action is an exception to the normal rule that the proper party to bring a suit on behalf of a corporation is the corporation itself, acting through its directors or a majority of its shareholders. Accordingly, Rule 23.1, which establishes procedures designed to prevent minority shareholders from abusing this equitable device, is addressed only to situations in which shareholders seek to enforce a right that "may properly be asserted" by the corporation itself. In contrast, as the language of § 36(b) indicates, Congress intended the fiduciary duty imposed on investment advisers by that statute to be enforced solely by security holders of the investment company and the SEC. It would be anomalous, therefore, to apply a Rule intended to prevent a shareholder from improperly suing in place of the corporation to a statute, like § 36(b), conferring a right which the corporation itself cannot enforce. It follows that Rule 23.1 does not apply to an action brought by a shareholder under § 36(b) of the Investment Company Act and that the plaintiff in such a case need not first make a demand upon the fund's directors before bringing suit.

The judgment of the Court of Appeals is therefore

Affirmed.

JUSTICE STEVENS, concurring in the judgment.

There are two petitioners in this case, the Mutual Fund and its investment adviser. Even if the former could properly assert an action against the latter under § 36(b) of the Investment Company Act of 1940, 84 Stat. 1428, 15 U. S. C. § 80a–35(b) (1982 ed.)—an action which in turn could be "derivatively" brought by a security holder—in my opinion it would nevertheless remain clear that respondent, as a shareholder of the Fund, could maintain this action without first making a demand on the directors of the Fund to do so.

The rule that sometimes requires a shareholder to make an appropriate demand before commencing a derivative action has its source in the law that gives rise to the derivative action itself. Rule 23.1 of the Federal Rules of Civil Procedure merely requires that the complaint in such a case allege the facts that will enable a federal court to decide whether such a demand requirement has been satisfied; Rule 23.1 is not the source of any such requirement. The plain language of the Rule makes that perfectly clear; the Rule does not require a demand, it only requires that the complaint allege with particularity what demand if any has been made on the corporation.[1] Moreover, the history of Rule 23.1 and its predecessors, which the Court recites *ante*, at 529–533, demonstrates that the demand requirement was not created by the Rule, but rather by a decision of this Court, *Hawes* v. *Oakland*, 104 U. S. 450 (1882). When the current Rule's predecessor was promulgated shortly after *Hawes*, it did not create a demand requirement—that had already been done by *Hawes*. Rather it operated to ensure that the pleadings would be adequate to enable courts to decide whether the applicable demand requirement had been satisfied. Thus the

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[1] "In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would otherwise not have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interest of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs." Fed. Rule Civ. Proc. 23.1.

Rule concerns itself solely with the adequacy of the pleadings; it creates no substantive rights.[2]

In this case the respondent fully complied with Rule 23.1. Having made no effort to obtain action from the directors, he simply pleaded that no demand had been made.[3] The question in this case is not whether the complaint complies with the pleading requirements in Rule 23.1.[4] Rather, the question is whether the federal statute that expressly creates a cause of action that the shareholder may maintain on behalf of the mutual fund implicitly conditions that express right on an unmentioned intracorporate procedural requirement. For two reasons it is clear to me that it does not.

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[2] This construction of the Rule is consistent with the Rules Enabling Act, which states that the federal "rules shall not abridge, enlarge or modify any substantive right," 28 U. S. C. § 2072. The thrust of petitioners' position, and our prior cases, is that demand requirements enhance the role of managerial prerogatives and expertise by requiring the submission of disputes to management. See *United Copper Securities Co.* v. *Amalgamated Copper Co.*, 244 U. S. 261, 263–264 (1917); *Delaware & Hudson Co.* v. *Albany & Susquehanna R. Co.*, 213 U. S. 435, 446 (1909); *Hawes* v. *Oakland*, 104 U. S. 450, 457 (1882). It cannot be doubted that this type of requirement, designed to improve corporate governance, is one of substantive law. See *Walker* v. *Armco Steel Corp.*, 446 U. S. 740 (1980); Ely, The Irrepressible Myth of Erie, 87 Harv. L. Rev. 693 (1974). Therefore, there is substantial doubt whether the Rule could create such a requirement consistently with the Rules Enabling Act. See *Mississippi Publishing Corp.* v. *Murphree*, 326 U. S. 438, 445–446 (1946); *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 14 (1941). Since the Rule does not clearly create such a substantive requirement by its express terms, it should not be lightly construed to do so and thereby alter substantive rights. See *Hanna* v. *Plumer*, 380 U. S. 460, 470–471 (1965).

[3] Paragraph 14 of respondent's complaint states: "No demand has been made by the plaintiff upon the Fund or its directors to institute or prosecute this action for the reason that no such demand is required under § 36(b) of the Act. Moreover, all of the directors are beholden to R&T for their positions and have participated in the wrongs complained of in this action. Their initiation of an action like the instant one would place the prosecution of this action in the hands of persons hostile to its success." App. 7a–8a.

[4] The Court does not reject this reading of the Rule, but rather leaves the question open. See *ante*, at 532–533, n. 8. In my judgment the Rule and its history are sufficiently clear that the question left open by the Court should be decided, rather than embarking on the more difficult private right of action analysis in which the Court engages. This is all the more justified since, in my view, there could be no demand requirement irrespective of the correct answer to the private right of action question.

First, the text and legislative history of the statute are inconsistent with a demand requirement. No such condition is mentioned in the statute, and it is a matter of sufficient importance to warrant express mention if Congress had intended it. Instead, the express terms of the statute are inconsistent with such a requirement. A demand requirement is premised upon the usual respect courts accord the managerial prerogatives of directors, see n. 2, *supra;* however, in § 36(b) Congress explicitly rejected the usual rule. As the Court has previously recognized, and acknowledges again today, § 36(b) stands in contrast to the rest of the Act in that unlike its other provisions, § 36(b) limits the usual discretion accorded directors by providing that the directors' position shall be given only "such consideration by the court as is deemed appropriate under all the circumstances." See *ante*, at 539–541; *Burks* v. *Lasker*, 441 U. S. 471, 484 (1979).[5] Congress laid out its own test for consideration of the directors' position in § 36(b), rather than relying on a demand requirement and the usual respect for managerial decisionmaking which it embodies.

The reason for congressional rejection of the usual deference paid directorial expertise and prerogatives is clear enough. The history of the statute is replete with findings that directors could not be relied upon to control excessive advisory fees. See *ante*, at 537–541; Wharton School Study of Mutual Funds, H. R. Rep. No. 2274, 87th Cong., 2d Sess., 30, 34, 66–67 (1962); Securities and Exchange Commission, Public Policy Implications of Investment Company Growth, H. R. Rep. No. 2337, 89th Cong., 2d Sess., 128–148 (1966);

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[5] See also S. Rep. No. 91–184, p. 15 (1969).

Hearings on S. 1659 before the Senate Committee on Banking and Currency, 90th Cong., 1st Sess., 1193–1200 (1967); S. Rep. No. 91–184, pp. 2, 5–6 (1969). In light of these findings, it cannot be maintained that Congress intended that the very directors who had failed to control excessive fees be involved in the decision whether to challenge those fees.

Moreover, Congress specifically considered the demand issue, in a predecessor version of § 36(b), passed by the Senate in 1968, which required that a security holder make a demand on the Securities and Exchange Commission prior to filing suit. S. 3724, 90th Cong., 2d Sess., § 8(d)(6) (1968). After further consideration this requirement was deleted. Thus, it cannot be said that Congress was unaware of the demand concept, yet it decided not to impose it even with respect to the SEC.

Second, a demand requirement would serve no meaningful purpose and would undermine the efficacy of the statute. As noted above, Congress intended to authorize this type of shareholder action even though the contract between the fund and its investment adviser had been expressly approved by the independent directors of the fund. Since the disinterested directors are required to review and approve all advisory fee contracts under § 15 of the Act, 15 U. S. C. § 80a–15 (1982 ed.), a demand would be a futile gesture after the directors have already passed on the contract. Because the directors may not terminate a suit, see *Burks*, *supra*, at 484, the only effect of a demand requirement would be to delay the commencement of the suit. That in turn would reduce the effectiveness of the Act as a vehicle for protecting investors, since § 36(b)(3) limits recovery to actual damages incurred beginning one year prior to commencement of suit. Thus the demand process would permit investment advisers to keep several months of excessive fees—a consequence squarely at odds with the purposes of the Act and hence congressional intent.

I find nothing in the statute or its history supporting the notion that Congress intended to condition the maintenance of a § 36(b) action on any antecedent intracorporate demand procedure. I would therefore affirm the judgment of the Court of Appeals without reaching the question whether the Fund itself could maintain an action under § 36(b).

McDONOUGH POWER EQUIPMENT, INC. *v.* GREENWOOD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 82-958. Argued November 28, 1983—Decided January 18, 1984

Respondent parents and son sued petitioner in Federal District Court to recover damages sustained by the son when his feet came in contact with the blades of a riding lawnmower manufactured by petitioner. After a trial that extended over a 3-week period, the District Court entered judgment for petitioner upon a jury verdict and denied respondents' motion for a new trial. One of the grounds alleged for a new trial was that the District Court had erred in denying respondents' motion to approach the jury after the judgment was entered because one of the jurors had not responded to a question on *voir dire* seeking to elicit information about previous "injuries . . . that resulted in any disability or prolonged pain or suffering" to members of the juror's immediate family when in fact the juror's son had sustained a broken leg as a result of an exploding tire. The Court of Appeals reversed, holding that the juror's failure to respond affirmatively to the question on *voir dire* had prejudiced respondents' right of peremptory challenge.

Held: Respondents are not entitled to a new trial unless the juror's failure to disclose denied them their right to an impartial jury. Courts should exercise judgment in preference to the automatic reversal for "error" and ignore errors that do not affect the essential fairness of a trial. To invalidate the result of a 3-week trial because of a juror's mistaken, though honest, response to a question, is to insist on something closer to perfection than our judicial system can be expected to give. It ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process because counsel lacked an item of information that he should have obtained from a juror on *voir dire* examination. The Court of Appeals' standard is contrary to the practical necessities of judicial management reflected in Federal Rule of Civil Procedure 61 and the harmless-error statute, 28 U. S. C. § 2111. To obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire* and then further show that a correct response would have provided a valid basis for a challenge for cause. Pp. 553–556.

687 F. 2d 338, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a concurring opinion, in which STEVENS and O'CONNOR, JJ., joined, *post*, p. 556. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 557.

Donald Patterson argued the cause and filed briefs for petitioner.

Gene E. Schroer argued the cause for respondents. With him on the brief was *Dan L. Wulz.**

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents, Billy Greenwood and his parents, sued petitioner McDonough Power Equipment, Inc., to recover damages sustained by Billy when his feet came in contact with the blades of a riding lawnmower manufactured by petitioner. The United States District Court for the District of Kansas entered judgment for petitioner upon a jury verdict and denied respondents' motion for new trial. On appeal, however, the Court of Appeals for the Tenth Circuit reversed the judgment of the District Court and ordered a new trial. It held that the failure of a juror to respond affirmatively to a question on *voir dire* seeking to elicit information about previous injuries to members of the juror's immediate family had "prejudiced the Greenwoods' right to peremptory challenge," 687 F. 2d 338, 342 (1982), and that a new trial was necessary to cure this error. We granted certiorari, 462 U. S. 1130 (1983), and now hold that respondents are not entitled to a new trial unless the juror's failure to disclose denied respondents their right to an impartial jury.

During the *voir dire* prior to the empaneling of the six-member jury, respondents' attorney asked prospective jurors the following question:

**Jerry L. Beane* filed a brief for Southern Union Co. as *amicus curiae* urging affirmance.

> "Now, how many of you have yourself or any members of your immediate family sustained any severe injury, not necessarily as severe as Billy, but sustained any injuries whether it was an accident at home, or on the farm or at work that resulted in any disability or prolonged pain and suffering, that is you or any members of your immediate family?" App. 19.

Ronald Payton, who eventually became a juror, did not respond to this question, which was addressed to the panel as a whole. After a trial which extended over a 3-week period, the jury found for petitioner McDonough.[1] Four days after judgment was entered for petitioner, respondents moved under local Rule 23A for permission to approach the members of the jury. In support of their motion respondents asserted that they were of "information and belief" that juror Payton's son may have been injured at one time, a fact which had not been revealed during *voir dire*. *Id.*, at 68. The District Court ruled that respondents had failed to show just cause to approach the jury. *Id.*, at 73.

Undeterred, the next day respondents filed a second motion for permission to approach the jury, attaching an affidavit from respondent John Greenwood,[2] who asserted that in the course of his employment as a Navy recruiter, he had reviewed the enlistment application of juror Payton's son. In that application Payton's son stated that he had been injured in the explosion of a truck tire. The District Court granted respondents permission to approach juror Payton regarding the injuries allegedly sustained by his son. The District Court directed that the inquiry should be brief and polite and made in a manner convenient to the juror. The District Court noted that it was not "overly impressed with the significance of this particular situation." *Id.*, at 89. No provision was made to record the inquiry of juror Payton.

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[1] Although respondents sued only petitioner McDonough, under Kansas law, which applied in this diversity action, the jury was permitted to consider the relative fault of three nondefendants: Jeff Morris, a next-door neighbor who was operating the lawnmower involved in the accident, Jeff's father, and Billy's mother. The jury assessed Billy's damages in the amount of $375,000, and found Jeff Morris 20% at fault, Jeff's father 45% at fault, and Billy's mother 35% at fault. The jury determined that petitioner McDonough's percentage of fault was zero.

[2] It is not clear from the opinion of the Court of Appeals whether the information stated in Greenwood's affidavit was known to respondents or their counsel at the time of the *voir dire* examination. If it were, of course, respondents would be barred from later challenging the composition of the jury when they had chosen not to interrogate juror Payton further upon receiving an answer which they thought to be factually incorrect. See *Johnson* v. *Hill*, 274 F. 2d 110, 115–116 (CA8 1960).

On the same day that the District Court granted respondents permission to approach juror Payton, respondents moved for a new trial, asserting 18 grounds in justification, including the District Court's alleged error in denying respondents' motion to approach the jury. This was the only instance when respondents even tangentially referred the District Court to the juror's failure to respond as a ground for a new trial. Shortly after the parties placed a telephone conference call to juror Payton, the District Court denied respondents' motion for a new trial, finding that the "matter was fairly and thoroughly tried and that the jury's verdict was a just one, well-supported by the evidence." *Id.*, at 106. The District Court was never informed of the results of the examination of juror Payton, nor did respondents ever directly assert before the District Court that juror Payton's nondisclosure warranted a new trial.

On appeal, the Court of Appeals proceeded directly to the merits of respondents' claim that juror Payton's silence had prejudiced their right to exercise peremptory challenges, rather than remanding the case back to the District Court for a hearing.[3] The Court of Appeals simply recited the recollections of counsel for each party of their conference telephone call with juror Payton contained in their appellate briefs, stating that the "unrevealed information" indicated probable bias "because it revealed a particularly narrow concept of what constitutes a serious injury." 687 F. 2d, at 343. The Court of Appeals assumed that juror Payton had answered in good faith, but stated:

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[3] Although neither party challenges the propriety of the Court of Appeals' having disposed of the question on the merits, we believe that the proper resolution of the legal issue should be made by the District

> "Good faith, however, is irrelevant to our inquiry. If an average prospective juror would have disclosed the information, and that information would have been significant and cogent evidence of the juror's probable bias, a new trial is required to rectify the failure to disclose it." *Ibid.* (citation omitted).

Court. See *infra*, at 556. Nevertheless, we address the issue in order to correct the legal standard the District Court should apply upon remand.

Both parties apparently agree that during the telephone conversation with juror Payton, he related that his son had received a broken leg as the result of an exploding tire. Counsel for respondents in their brief to the Court of Appeals recalled Payton saying that "'it did not make any difference whether his son had been in an accident and was seriously injured,'" "'that having accidents are a part of life,'" and that "'all his children have been involved in accidents.'" Brief for Appellants in No. 80–1698 (CA10), p. 7. Counsel for petitioners recall Payton as saying that he "did not regard [his son's broken leg] as a 'severe' injury and as he understood the question [the injury] did not result in any 'disability or prolonged pain and suffering.' As far as Mr. Payton is concerned he answered counsel's question honestly, and correctly, by remaining silent." Brief for Appellee in No. 80–1698 (CA10), p. 18.

Nevertheless, the manner in which the parties presented the issue of juror Payton's failure to respond on *voir dire* was highly unorthodox. While considerations of judicial economy might have motivated the Court of Appeals in this case to proceed directly to the issue of the effect of juror Payton's nondisclosure, in cases in which a party is asserting a ground for new trial, the normal procedure is to remand such issues to the district court for resolution. Although petitioner does not dispute respondents' version of the telephone call to juror Payton, it is foreseeable that in another such case, the parties could present the appellate court with a continuing, difficult factual dispute. Appellate tribunals are poor substitutes for trial courts for developing a record or resolving factual controversies.

This Court has long held that "'[a litigant] is entitled to a fair trial but not a perfect one,' for there are no perfect trials." *Brown* v. *United States*, 411 U. S. 223, 231–232 (1973), quoting *Bruton* v. *United States*, 391 U. S. 123, 135 (1968), and *Lutwak* v. *United States*, 344 U. S. 604, 619 (1953). Trials are costly, not only for the parties, but also for the jurors performing their civic duty and for society which pays the judges and support personnel who manage the trials. It seems doubtful that our judicial system would have the resources to provide litigants with perfect trials, were they possible, and still keep abreast of its constantly increasing caseload. Even this straightforward products liability suit extended over a 3-week period.

We have also come a long way from the time when all trial error was presumed prejudicial and reviewing courts were considered "'citadels of technicality.'" *Kotteakos* v. *United States*, 328 U. S. 750, 759 (1946), quoting Kavanagh, Improvement of Administration of Criminal Justice by Exercise of Judicial Power, 11 A. B. A. J. 217, 222 (1925). The harmless-error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for "error" and ignore errors that do not affect the essential fairness of the trial. See *Kotteakos*, *supra*, at 759–760. For example, the general rule governing motions for a new trial in the district courts is contained in Federal Rule of Civil Procedure 61, which provides:

> "No error . . . or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict . . . unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding *must* disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." (Emphasis added.)

While in a narrow sense Rule 61 applies only to the district courts, see Fed. Rule Civ. Proc. 1, it is well settled that the appellate courts should act in accordance with the salutary policy embodied in Rule 61. See, *e. g.*, *Keaton* v. *Atchison, T. & S. F. R. Co.*, 321 F. 2d 317, 319 (CA7 1963); *Box* v. *Swindle*, 306 F. 2d 882, 887 (CA5 1962); *De Santa* v. *Nehi Corp.*, 171 F. 2d 696, 698 (CA2 1948). Congress has further reinforced the application of Rule 61 by enacting the harmless-error statute, 28 U. S. C. §2111, which applies directly to appellate courts and which incorporates the same principle as that found in Rule 61. See *Tipton* v. *Socony Mobil Oil Co.*, 375 U. S. 34, 37 (1963); *United States* v. *Borden Co.*, 347 U. S. 514, 516, and n. 5 (1954).[4]

The ruling of the Court of Appeals in this case must be assessed against this background. One touchstone of a fair trial is an impartial trier of fact—"a jury capable and willing to decide the case solely on the evidence before it." *Smith* v. *Phillips*, 455 U. S. 209, 217 (1982). *Voir dire* examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in the responses to questions on *voir dire* may result in a juror's being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges. The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious.

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[4] The text of 28 U. S. C. §2111 reads in full:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

This provision traces its lineage to the harmless-error provision of §269 of the former Judicial Code, which was enacted in 1919. Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181; see *Kotteakos* v. *United States*, 328 U. S. 750, 758–762 (1946); C. Wright & A. Miller, Federal Practice and Procedure §2881 (1973).

The critical question posed to juror Payton in this case asked about "injuries . . . that resulted in any disability or prolonged pain or suffering." App. 19. Juror Payton apparently believed that his son's broken leg sustained as a result of an exploding tire was not such an injury. In response to a similar question from petitioner's counsel, however, another juror related such a minor incident as the fact that his 6-year-old son once caught his finger in a bike chain. *Id.*, at 52. Yet another juror failed to respond to the question posed to juror Payton, and only the subsequent questioning of petitioner's counsel brought out that her husband had been injured in a machinery accident. *Id.*, at 19, 53–54.

The varied responses to respondents' question on *voir dire* testify to the fact that jurors are not necessarily experts in English usage. Called as they are from all walks of life, many may be uncertain as to the meaning of terms which are relatively easily understood by lawyers and judges. Moreover, the statutory qualifications for jurors require only a minimal competency in the English language. 28 U. S. C. § 1865 (1976 ed. and Supp. V). Thus, we cannot say, and we doubt that the Court of Appeals could say, which of these three jurors was closer to the "average juror" in his or her response to the question, but it is evident that such a standard is difficult to apply and productive of uncertainties.

To invalidate the result of a 3-week trial because of a juror's mistaken, though honest, response to a question, is to insist on something closer to perfection than our judicial system can be expected to give. A trial represents an important investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process because counsel lacked an item of information which objectively he should have obtained from a juror on *voir dire* examination. Whatever the merits of the Court of Appeals' standard in a world which would redo and reconstruct what had gone before upon any evidence of abstract imperfection, we think it is contrary to the practical necessities of judicial management reflected in Rule 61 and § 2111. We hold that to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

Generally, motions for a new trial are committed to the discretion of the district court. *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, 251 (1940). The Court of Appeals was mistaken in deciding as it did that respondents were entitled to a new trial. In the event that the issue remains relevant after the Court of Appeals has disposed of respondents' other contentions on appeal, the District Court may hold a hearing to determine whether respondents are entitled to a new trial under the principles we state here. The judgment of the Court of Appeals is

Reversed.

JUSTICE BLACKMUN, with whom JUSTICE STEVENS and JUSTICE O'CONNOR join, concurring.

I agree with the Court that the proper inquiry in this case is whether the plaintiffs had the benefit of an impartial trier of fact. I also agree that, in most cases, the honesty or dishonesty of a juror's response is the best initial indicator of whether the juror in fact was impartial. I therefore join the Court's opinion, but I write separately to state that I understand the Court's holding not to foreclose the normal avenue of relief available to a party who is asserting that he did not have the benefit of an impartial jury. Thus, regardless of whether a juror's answer is honest or dishonest, it remains within a trial court's option, in determining whether a jury was biased, to order a post-trial hearing at which the movant has the opportunity to demonstrate actual bias or, in exceptional circumstances, that the facts are such that bias is to be inferred. See *Smith* v. *Phillips*, 455 U. S. 209, 215–216 (1982); *id.*, at 221–224 (O'CONNOR, J., concurring).

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in the judgment.

I agree with the Court that the Court of Appeals employed an erroneous legal standard to determine whether a new trial was required in this case, and that the Court of Appeals compounded that error by failing to remand the case to the District Court for a hearing and decision on the motion for new trial in the first instance. I concur only in the judgment, however, because I have difficulty understanding the import of the legal standard adopted by the Court.

The Court of Appeals ordered a new trial because Ronald Payton, who later was chosen as jury foreman, incorrectly answered an important question posed to prospective jurors on *voir dire*. Specifically, although asked whether any family members had "sustained any injuries . . . that resulted in any disability or prolonged pain or suffering," Payton failed to disclose a previous injury his son had incurred in a truck-tire explosion. The court concluded that, because the information available to counsel during *voir dire* was erroneous, Payton's failure to respond "prejudiced the Greenwoods' right to peremptory challenge." 687 F. 2d 338, 342 (CA10 1982). It therefore held that the Greenwoods' motion for a new trial should have been granted, and entered judgment granting the motion.

I agree with the Court that a finding that less than complete information was available to counsel conducting *voir dire* does not by itself require a new trial. I cannot join, however, in the legal standard asserted by the Court's opinion. In my view, the proper focus when ruling on a motion for new trial in this situation should be on the bias of the juror and the resulting prejudice to the litigant. More specifically, to be awarded a new trial, a litigant should be required to demonstrate that the juror incorrectly responded to a material question on *voir dire*, and that, under the facts and circumstances surrounding the particular case, the juror was biased against the moving litigant. See, *e. g.*, *McCoy* v. *Goldston*, 652 F. 2d 654, 659–660 (CA6 1981).

When applying this standard, a court should recognize that "[t]he bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as [a] matter of law." *United States* v. *Wood*, 299 U. S. 123, 133 (1936). See also *Smith* v. *Phillips*, 455 U. S. 209, 221–224 (1982) (O'CONNOR, J., concurring). Because the bias of a juror will rarely be admitted by the juror himself, "partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it," *id.*, at 221–222, it necessarily must be inferred from surrounding facts and circumstances. Therefore, for a court to determine properly whether bias exists, it must consider at least two questions: are there any facts in the case suggesting that bias should be conclusively presumed; and, if not, is it more probable than not that the juror was actually biased against the litigant. Whether the juror answered a particular question on *voir dire* honestly or dishonestly, or whether an inaccurate answer was inadvertent or intentional, are simply factors to be considered in this latter determination of actual bias.* I therefore cannot agree with the Court when it asserts that a new trial is not warranted whenever a prospective juror provides an honest answer to the question posed. Cf. *ante*, at 556. One easily can imagine cases in which a prospective juror provides what he subjectively believes to be an honest answer, yet that same answer is objectively incorrect and therefore suggests that the individual would be a biased juror in the particular case.

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*The Court of Appeals recognized several other factors in this case, not completely acknowledged by the Court's opinion, which might suggest that juror Payton was biased or that his potential bias resulted in prejudice to the Greenwoods. For example, by claiming during his informal examination after trial that "having accidents are a part of life," Payton may have displayed insufficient sensitivity to the Greenwoods' claims in this product liability action. This potential bias could only have been exacerbated by the fact that Payton served as foreman of the jury. Moreover, the jury initially returned a verdict assessing $0.00 in damages despite the fact that Billy Greenwood lost both his feet in the lawnmower accident; only upon reconvening after being admonished by the trial judge did the jury assess damages totaling $375,000. These factors should be considered along with any other relevant facts and circumstances by the District Court on remand.

Given the nature of this legal standard, and given that no claim is raised in this case that bias should be conclusively presumed, the Court of Appeals clearly erred by deciding the issue of juror bias itself rather than remanding the issue to the District Court for a hearing and decision in the first instance. Motions for new trial on the basis of juror bias are left to the sound discretion of the trial court, and its determination should not be lightly disturbed by an appellate court. This is especially true when decision on the motion turns, as it does here, on the particular facts and circumstances involved. See *ante*, at 551–552, n. 3, and 556. The trial court in this case, however, did not reach the point of exercising discretion because it never was notified about the results of the informal examination of juror Payton. Accordingly, the case should be remanded to the District Court for a hearing and decision consistent with the principles outlined above.

REPORTER'S NOTE

The next page is purposely numbered 801. The numbers between 559 and 801 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM OCTOBER 3, 1983, THROUGH JANUARY 16, 1984

OCTOBER 3, 1983

Affirmed on Appeal

No. 82–1840. KIRKSEY ET AL. *v.* MISSISSIPPI ET AL. Affirmed on appeal from D. C. D. C. JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument.

Appeals Dismissed

No. 82–370. CARPENTER *v.* HAMMOND, GOVERNOR OF ALASKA. Appeal from Sup. Ct. Alaska dismissed for want of substantial federal question.

No. 82–1710. FOX RIDGE ASSOCIATES & CO. *v.* BOARD OF ASSESSORS OF MARSHFIELD. Appeal from Sup. Jud. Ct. Mass. dismissed for want of substantial federal question. Reported below: 387 Mass. 1002, 441 N. E. 2d 258.

No. 82–1821. EXXON CORP. ET AL. *v.* EAGERTON, COMMISSIONER OF REVENUE OF ALABAMA, ET AL.; and
No. 82–1835. UNION OIL COMPANY OF CALIFORNIA ET AL. *v.* EAGERTON, COMMISSIONER OF REVENUE OF ALABAMA. Appeals from Sup. Ct. Ala. dismissed for want of substantial federal question. Reported below: 426 So. 2d 814.

No. 82–1946. OYSTER *v.* OYSTER. Appeal from Sup. Ct. Va. dismissed for want of substantial federal question.

No. 82–2016. SOLYOM *v.* MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION. Appeal from Ct. Sp. App. Md. dismissed for want of substantial federal question. Reported below: 53 Md. App. 280, 452 A. 2d 1283.

No. 82–2059. BARTLETT ET AL. *v.* WILLIAMS ET AL. Appeal from Sup. Ct. Conn. dismissed for want of substantial federal question. Reported below: 189 Conn. 471, 457 A. 2d 290.

No. 82–2116. DALGETY FOODS, INC. *v.* AVINA. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question.

No. 82–2124. ARCHER ET AL. *v.* METROPOLITAN TRANSIT AUTHORITY ET AL. Appeal from Ct. App. Tex., 3d Sup. Jud. Dist., dismissed for want of substantial federal question. Reported below: 636 S. W. 2d 484.

No. 82–2125. METROPOLITAN PACKAGE STORE ASSN., INC., ET AL. *v.* KOCH, MAYOR OF THE CITY OF NEW YORK, ET AL. Appeal from App. Div., Sup. Ct. N. Y., 3d Jud. Dept., dismissed for want of substantial federal question. Reported below: 89 App. Div. 2d 317, 457 N. Y. S. 2d 481.

No. 82–6732. FELIX *v.* NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 58 N. Y. 2d 156, 446 N. E. 2d 757.

No. 82–7019. SECREST *v.* SOUTH DAKOTA. Appeal from Sup. Ct. S. D. dismissed for want of substantial federal question. Reported below: 331 N. W. 2d 580.

No. 83–43. CLEVELAND ELECTRIC ILLUMINATING CO. *v.* PUBLIC UTILITIES COMMISSION OF OHIO ET AL. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. Reported below: 4 Ohio St. 3d 107, 447 N. E. 2d 746.

No. 83–48. DUNLAP ET AL. *v.* ILLINOIS. Appeal from App. Ct. Ill., 5th Dist., dismissed for want of substantial federal question. Reported below: 110 Ill. App. 3d 738, 442 N. E. 2d 1379.

No. 83–174. ANGEL ET AL. *v.* MIDLAM ET AL. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of substantial federal question.

No. 82–1156. TELEDYNE MOVIBLE OFFSHORE, INC., ET AL. *v.* THOMPSON. Appeal from Sup. Ct. La. dismissed for want of substantial federal question. JUSTICE POWELL, JUSTICE REHNQUIST, and JUSTICE O'CONNOR would note probable jurisdiction and set case for oral argument. Reported below: 419 So. 2d 822.

No. 82–1499. MARQUEZ *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 639 S. W. 2d 321.

No. 82–1856. ANDERSON *v.* FISHER ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 703 F. 2d 573.

No. 82–1947. KOKER ET UX. *v.* BETTS ET AL. Appeal from Sup. Ct. Wash. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 98 Wash. 2d 1003.

No. 82–2049. JOJOLA *v.* NEW MEXICO EX REL. HUMAN SERVICES DEPARTMENT. Appeal from Sup. Ct. N. M. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 99 N. M. 500, 660 P. 2d 590.

No. 82–2054. FALKENHAN *v.* PENNSYLVANIA. Appeal from Super. Ct. Pa. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 306 Pa. Super. 330, 452 A. 2d 750.

No. 82–2096. MOORE *v.* KHOURIE ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 703 F. 2d 576.

No. 82–2099. GIULIANI *v.* CHUCK. Appeal from Int. Ct. App. Haw. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 3 Haw. App. 681.

No. 82–2115. FIRST NATIONAL BANK & TRUST COMPANY OF EVANSTON, TRUSTEE *v.* ROSEWELL, COUNTY TREASURER OF COOK COUNTY, ET AL. Appeal from Sup. Ct. Ill. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 93 Ill. 2d 388, 444 N. E. 2d 126.

No. 82–2132. LEWELLEN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 705 F. 2d 440.

No. 82–6720. OGROD *v.* TOMLINSON COURT APARTMENTS. Appeal from C. A. 3d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 707 F. 2d 1395.

No. 82–6721. OGROD ET AL. *v.* SCHOOL DISTRICT OF PHILADELPHIA. Appeal from C. A. 3d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 707 F. 2d 1394.

No. 82–6783. SPENCE *v.* RODGERS ET AL. Appeal from C. A. 4th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 691 F. 2d 497.

No. 82–6850. OGROD *v.* WEISS ET AL. (two cases). Appeals from C. A. 3d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari denied.

No. 82–6989. LINDEN *v.* NEW YORK. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83–19. CRANE ET UX. *v.* MICHIGAN ET AL. Appeal from Ct. App. Mich. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83–5072. WEIGANG *v.* SILVERMAN ET AL. Appeal from Sup. Jud. Ct. Me. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83–5199. OGROD *v.* WEISS ET AL. Appeal from D. C. E. D. Pa. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 82–1868. ARNOLD TRANSIT CO., INC., ET AL. *v.* CITY OF MACKINAC ISLAND. Appeal from Sup. Ct. Mich. dismissed for want of substantial federal question. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 415 Mich. 362, 329 N. W. 2d 712.

No. 82–2005. WATKINS *v.* ROCHE. Appeal from Sup. Ct. Ga. dismissed for want of jurisdiction. Reported below: 250 Ga. xxix, 301 S. E. 2d 287.

No. 82–2070. INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS *v.* MARSLAND, PROSECUTING ATTORNEY, CITY AND COUNTY OF HONOLULU. Appeal from Sup. Ct. Haw. dismissed for want of substantial federal question. JUSTICE BRENNAN and JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument. Reported below: 66 Haw. 119, 657 P. 2d 1035.

No. 82–6950. SANTIAGO *v.* PENNSYLVANIA. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. JUSTICE BRENNAN and JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument. Reported below: 500 Pa. 530, 458 A. 2d 939.

No. 83–6. BESADNY, SECRETARY, WISCONSIN DEPARTMENT OF NATURAL RESOURCES, ET AL. *v.* LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS ET AL. Appeal from C. A. 7th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS would affirm the judgment. Reported below: 700 F. 2d 341.

No. 83–91. APTOS SEASCAPE CORP. *v.* COUNTY OF SANTA CRUZ ET AL. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of a final judgment. Reported below: 138 Cal. App. 3d 484, 188 Cal. Rptr. 191.

Vacated and Remanded on Appeal

No. 82–6583. DANIEL *v.* COLLIER. Appeal from Ct. App. Mich. Motion of appellant for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for further consideration in light of *Pickett* v. *Brown*, 462 U. S. 1 (1983). Reported below: 113 Mich. App. 74, 317 N. W. 2d 293.

Certiorari Granted—Vacated and Remanded

No. 82–1705. NATIONAL LABOR RELATIONS BOARD *v.* NEW YORK UNIVERSITY MEDICAL CENTER ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *NLRB* v. *Transportation Management Corp.*, 462 U. S. 393 (1983). Reported below: 702 F. 2d 284.

No. 82–1828. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY *v.* NORTHERN PLAINS RESOURCE COUNCIL ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Ruckelshaus* v. *Sierra Club*, 463 U. S. 680 (1983). Reported below: 670 F. 2d 847.

No. 82–1944. UNITED STATES *v.* GONSALVES. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Hasting*, 461 U. S. 499 (1983). Reported below: 691 F. 2d 1310.

No. 82–1975. DISTRICT 1199, NATIONAL UNION OF HOSPITAL & HEALTH CARE EMPLOYEES, A DIVISION OF RETAIL, WHOLESALE & DEPARTMENT STORE UNION, AFL–CIO *v.* ASSAD ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *DelCostello* v. *Teamsters*, 462 U. S. 151 (1983). Reported below: 703 F. 2d 36.

Certiorari Dismissed

No. 82–1870. MIANECKI ET AL. *v.* SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA ET AL. Sup. Ct. Nev. Certiorari dismissed for want of a final judgment. Reported below: 99 Nev. 93, 658 P. 2d 422.

Miscellaneous Orders

No. — — ——. IN RE FREEMAN. Motion to direct the Clerk to file the petition for writ of mandamus denied.

No. — — ——. HEFLIN ET AL. *v.* KENTUCKY STATE RACING COMMISSION ET AL. Motion to direct the Clerk to file the petition for writ of certiorari out of time denied.

No. — — ——. SMITH, PERSONAL REPRESENTATIVE OF THE ESTATE OF OLSON *v.* UNITED STATES. Motion to direct the Clerk to file the petition for writ of certiorari out of time denied.

No. A–108. HENRY S. BRANSCOME, INC., ET AL. *v.* UNITED STATES. Application for stay of the mandate of the United States Court of Appeals for the Fourth Circuit, presented to JUSTICE BRENNAN, and by him referred to the Court, denied. The order, heretofore entered by JUSTICE BRENNAN, is vacated.

No. A–115. NOBLE *v.* UNITED STATES. C. A. 7th Cir. Application for stay of mandate, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. A–162. CLARKSDALE BAPTIST CHURCH *v.* GREEN ET AL. D. C. D. C. Application for stay pending appeal, addressed to JUSTICE POWELL and referred to the Court, denied.

No. A–182 (83–334). BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ALABAMA, ET AL. *v.* BROWN ET AL. C. A. 11th Cir. Application for stay of enforcement of judgment, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A–186. KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER *v.* SMITH. Application to vacate the stay of execution of sentence of death, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. D–216. IN RE MEHTA, 451 U. S. 903. Application for readmission to the Bar of this Court denied.

No. D–280. IN RE STERN, 460 U. S. 1008. Application for admission to the Bar of this Court, presented to JUSTICE MARSHALL, and by him referred to the Court, denied. JUSTICE MARSHALL and JUSTICE STEVENS would grant the application.

No. D–339. IN RE DISBARMENT OF LEIBOWITZ. Disbarment entered. [For earlier order herein, see 461 U. S. 922.]

No. D–343. IN RE DISBARMENT OF MCGRATH. Disbarment entered. [For earlier order herein, see 461 U. S. 941.]

No. D–350. IN RE DISBARMENT OF BUCCI. Disbarment entered. [For earlier order herein, see 461 U. S. 954.]

No. D–356. IN RE DISBARMENT OF GORDON. Disbarment entered. [For earlier order herein, see 462 U. S. 1103.]

No. D–362. IN RE DISBARMENT OF CRANE. Disbarment entered. [For earlier order herein, see 462 U. S. 1114.]

No. 94, Orig. SOUTH CAROLINA *v.* REGAN, SECRETARY OF THE TREASURY. Motion of the defendant for leave to file a supplemental memorandum granted. Motion of the plaintiff for leave to file a supplemental memorandum granted. Motion of plaintiff and Texas for divided argument granted. Motion of National Association of Counties et al. for leave to file a brief as *amici curiae* granted. [For earlier order herein, see 462 U. S. 1114.]

No. 81–1335. DISTRICT OF COLUMBIA COURT OF APPEALS ET AL. *v.* FELDMAN ET AL., 460 U. S. 462. Motion of respondents to retax costs denied.

No. 81–2149. SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY *v.* STUMES. C. A. 8th Cir. [Certiorari granted, 463 U. S. 1228.] Motion for appointment of counsel granted, and it is ordered that Timothy J. McGreevy, Esquire, of Sioux Falls, S. D., be appointed to serve as counsel for respondent in this case.

No. 82–52. ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS ET AL. *v.* NORRIS, 463 U. S. 1073. Motion of respondent to retax costs denied.

No. 82–206. FIREFIGHTERS LOCAL UNION NO. 1784 *v.* STOTTS ET AL.; and

No. 82–229. MEMPHIS FIRE DEPARTMENT ET AL. *v.* STOTTS ET AL. C. A. 6th Cir. [Certiorari granted, 462 U. S. 1105.] Motion of petitioners for divided argument denied. Motion of respondents for divided argument and for additional time for oral argument denied. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted, and 10 minutes of petitioners' time for oral argument is allotted for that purpose.

No. 82–282. MCCAIN ET AL. *v.* LYBRAND ET AL. D. C. S. C. [Probable jurisdiction noted, 462 U. S. 1130.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 82–792. GROVE CITY COLLEGE ET AL. *v.* BELL, SECRETARY OF EDUCATION, ET AL. C. A. 3d Cir. [Certiorari granted, 459 U. S. 1199.] Motion of American Association of University Women et al. to reconsider order denying motion for leave to participate in oral argument as *amici curiae* [463 U. S. 1235] denied.

No. 82–945. SURE-TAN, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. [Certiorari granted, 460 U. S. 1021.] Motion of Asian American Legal Defense and Education Fund et al. for leave to file a brief as *amici curiae* granted.

No. 82–1031. JEFFERSON PARISH HOSPITAL DISTRICT NO. 2 ET AL. *v.* HYDE. C. A. 5th Cir. [Certiorari granted, 460 U. S.

1021.] Motion of American Society of Anesthesiologists, Inc., for leave to file out-of-time motion for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 82-1074. AMERICAN CAST IRON PIPE CO. *v.* PETTWAY ET AL. C. A. 11th Cir. Motion of the parties to defer consideration of the petition for writ of certiorari granted.

No. 82-1135. ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* WIGGINS. C. A. 5th Cir. [Certiorari granted, 459 U. S. 1199.] Motion of respondent *pro se* for leave to file supplemental brief on the merits granted.

No. 82-1150. ELLIS ET AL. *v.* BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYES ET AL. C. A. 9th Cir. [Certiorari granted, 460 U. S. 1080.] Motion of State Bar of California for leave to file a brief as *amicus curiae* granted.

No. 82-1186. TRANS WORLD AIRLINES, INC. *v.* FRANKLIN MINT CORP. ET AL.; and
No. 82-1465. FRANKLIN MINT CORP. ET AL. *v.* TRANS WORLD AIRLINES, INC. C. A. 2d Cir. [Certiorari granted, 462 U. S. 1118.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 82-1213. NEW YORK *v.* QUARLES. Ct. App. N. Y. [Certiorari granted, 461 U. S. 942.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 82-1253. SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, ET AL. *v.* BARTLETT. C. A. 8th Cir. [Certiorari granted, 461 U. S. 956.] Motion of Dewey County, South Dakota, et al. for leave to participate in oral argument as *amici curiae* and for divided argument granted. Request for additional time for oral argument denied.

No. 82-1260. COPPERWELD CORP. ET AL. *v.* INDEPENDENCE TUBE CORP. C. A. 7th Cir. [Certiorari granted, 462 U. S. 1131.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted, and 10 minutes of petitioners' time for oral argument is allotted for that purpose. JUSTICE WHITE took no part in the consideration or decision of this motion.

No. 82–1349. UNITED STATES *v.* S.A. EMPRESA DE VIACAO AEREA RIO GRANDENSE (VARIG AIRLINES) ET AL.; and

No. 82–1350. UNITED STATES *v.* UNITED SCOTTISH INSURANCE CO. ET AL. C. A. 9th Cir. [Certiorari granted, 461 U. S. 925.] Motion of respondents for divided argument denied.

No. 82–1474. HOOVER ET AL. *v.* RONWIN ET AL. C. A. 9th Cir. [Certiorari granted, 461 U. S. 926.] Motions of National Conference of Bar Examiners and State Bar of California for leave to file briefs as *amici curiae* granted. JUSTICE O'CONNOR took no part in the consideration or decision of these motions.

No. 82–1554. STRICKLAND, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL. *v.* WASHINGTON. C. A. 11th Cir. [Certiorari granted, 462 U. S. 1105.] Motion of Washington Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 82–1591. RUCKELSHAUS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL. C. A. D. C. Cir. [Certiorari granted, 461 U. S. 956.] Motion of American Gas Association for leave to file a brief as *amicus curiae* granted.

No. 82–1651. NIX, WARDEN OF THE IOWA STATE PENITENTIARY *v.* WILLIAMS. C. A. 8th Cir. [Certiorari granted, 461 U. S. 956.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 82–1711. COLORADO *v.* QUINTERO. Sup. Ct. Colo. [Certiorari granted, 463 U. S. 1206.] Motion of Appellate Committee of the California District Attorneys Association et al. for leave to file a brief as *amici curiae* granted.

No. 82–1770. NATIONAL ENQUIRER, INC. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (JONES ET AL., REAL PARTIES IN INTEREST), 462 U. S. 1144. Respondent Jones is requested to file a response to the petition for rehearing within 30 days.

No. 82–2157. CENTRAL STATES, SOUTHEAST & SOUTHWEST AREAS PENSION FUND, ET AL. *v.* CENTRAL TRANSPORT, INC., ET AL. C. A. 6th Cir. Motions of Arthur Young & Co., Bricklayers Fringe Benefit Funds-Metropolitan Area et al., and National Coordinating Committee for Multiemployer Plans for leave to file briefs as *amici curiae* granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 82–1876. FOREMOST PRO COLOR, INC. *v.* EASTMAN KODAK CO. C. A. 9th Cir.;
No. 82–1888. VOLKSWAGENWERK A. G. *v.* FALZON ET AL., INDIVIDUALLY AND AS NEXT FRIENDS OF FALZON ET AL. Sup. Ct. Mich.;
No. 82–1899. TRANS WORLD AIRLINES, INC. *v.* NEW YORK STATE HUMAN RIGHTS APPEAL BOARD ET AL. Ct. App. N. Y.;
No. 82–1938. CALIFORNIA ET AL. *v.* STANDARD OIL COMPANY OF CALIFORNIA ET AL. C. A. 9th Cir.; and
No. 82–2128. AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. *v.* LITTON SYSTEMS, INC., ET AL. C. A. 2d Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 82–6502. IN RE RUSH, 462 U. S. 1117. Motion of petitioner to reconsider order denying leave to proceed *in forma pauperis* denied.

No. 82–6702. GANEY *v.* SAFRON ET AL., 463 U. S. 1205. Motion of petitioner to reconsider order denying leave to proceed *in forma pauperis* denied.

No. 82–6854. IN RE NAKAGAWA. C. A. 10th Cir. Petition for writ of common-law certiorari denied.

No. 82–6883. IN RE SMITH;
No. 82–6900. IN RE TIMSON;
No. 82–6901. IN RE PAVILONIS;
No. 82–6983. IN RE COURTNEY; and
No. 83–5094. IN RE GIBSON. Petitions for writs of mandamus denied.

No. 82–6816. IN RE MCDONALD; and
No. 82–6857. IN RE SIMS. Petitions for writs of mandamus and/or prohibition denied.

No. 83–89. IN RE THOMASSEN. Motion of petitioner to expedite consideration of the petition for writ of mandamus denied. Petition for writ of mandamus denied.

No. 82-6887. In re Hallstrom; and

No. 82-6999. In re Dearing. Petitions for writs of prohibition denied.

Probable Jurisdiction Noted

No. 82-1579. Hayfield Northern Railroad Co., Inc., et al. *v.* Chicago & North Western Transportation Co. Appeal from C. A. 8th Cir. Probable jurisdiction noted. Reported below: 693 F. 2d 819.

No. 82-1913. Garcia *v.* San Antonio Metropolitan Transit Authority et al.; and

No. 82-1951. Donovan, Secretary of Labor *v.* San Antonio Metropolitan Transit Authority et al. Appeals from D. C. W. D. Tex. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 557 F. Supp. 445.

Certiorari Granted

No. 82-1721. Seattle Times Co., dba The Seattle Times, et al. *v.* Rhinehart et al. Sup. Ct. Wash. Certiorari granted. Reported below: 98 Wash. 2d 226, 654 P. 2d 673.

No. 82-1724. New York *v.* Uplinger et al. Ct. App. N. Y. Certiorari granted. Reported below: 58 N. Y. 2d 936, 447 N. E. 2d 62.

No. 82-1766. Securities Industry Assn. et al. *v.* Board of Governors of the Federal Reserve System et al. C. A. D. C. Cir. Certiorari granted. Reported below: 224 U. S. App. D. C. 21, 693 F. 2d 136.

No. 82-1845. Colorado *v.* Nunez. Sup. Ct. Colo. Certiorari granted. Reported below: 658 P. 2d 879.

No. 82-1925. United States Department of State et al. *v.* Washington Post Co. C. A. D. C. Cir. Certiorari granted. Reported below: 222 U. S. App. D. C. 248, 685 F. 2d 698.

No. 82-1998. Watt, Secretary of the Interior, et al. *v.* Community for Creative Non-Violence et al. C. A. D. C. Cir. Certiorari granted. Reported below: 227 U. S. App. D. C. 19, 703 F. 2d 586.

No. 83-56. Heckler, Secretary of Health and Human Services *v.* Community Health Services of Crawford

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COUNTY, INC., ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 698 F. 2d 615.

No. 83-87. BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95 ET AL. *v.* VAIL. C. A. 7th Cir. Certiorari granted. Reported below: 706 F. 2d 1435.

No. 83-96. LIMBACH, TAX COMMISSIONER OF OHIO *v.* HOOVEN & ALLISON CO. Sup. Ct. Ohio. Certiorari granted. Reported below: 4 Ohio St. 3d 169, 447 N. E. 2d 1295.

No. 83-219. MCDONALD *v.* CITY OF WEST BRANCH, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 709 F. 2d 1505.

No. 82-1795. CAPITAL CITIES CABLE, INC., ET AL. *v.* CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD. C. A. 10th Cir. Certiorari granted. In addition to the questions presented by the petitioners, the parties are directed to brief and argue the following question: Whether the State's regulation of liquor advertising, as applied to out-of-state broadcast signals, is valid in light of existing federal regulation of cable broadcasting. Reported below: 699 F. 2d 490.

No. 82-1860. SCHNEIDER MOVING & STORAGE CO. *v.* ROBBINS ET AL.; and

No. 82-1862. PROSSER'S MOVING & STORAGE CO. *v.* ROBBINS ET AL. C. A. 8th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 700 F. 2d 433.

No. 82-1988. TOWER, PUBLIC DEFENDER OF DOUGLAS COUNTY, OREGON, ET AL. *v.* GLOVER. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 700 F. 2d 556.

Certiorari Denied. (See also Nos. 82-1499, 82-1856, 82-1947, 82-2049, 82-2054, 82-2096, 82-2099, 82-2115, 82-2132, 82-6720, 82-6721, 82-6783, 82-6850, 82-6989, 83-19, 83-5072, 83-5199, 83-6, and 82-6854, *supra.*)

No. 82-1325. I.A.M. NATIONAL PENSION FUND *v.* ELSER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 684 F. 2d 648.

No. 82-1450. IN RE SCHULMAN. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 727.

No. 82-1486. CHEVRON CHEMICAL CO. *v.* GILMORE, JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 82-1600. GIBBONS, TRUSTEE OF THE PROPERTY OF CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. *v.* NATIONAL STEEL SERVICE CENTER, INC. C. A. 8th Cir. Certiorari denied. Reported below: 693 F. 2d 817.

No. 82-1607. BUNKFELDT BROADCASTING CORP. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 226 U. S. App. D. C. 210, 701 F. 2d 221.

No. 82-1635. LANIGAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 707 F. 2d 1396.

No. 82-1636. BARNETT ET UX. *v.* FALVEY ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 423 So. 2d 132.

No. 82-1644. SWAIN *v.* LEHMAN, SECRETARY OF THE NAVY. C. A. D. C. Cir. Certiorari denied. Reported below: 226 U. S. App. D. C. 211, 701 F. 2d 222.

No. 82-1645. JULIUS GOLDMAN'S EGG CITY *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 697 F. 2d 1051.

No. 82-1667. LEACH *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 250.

No. 82-1670. CHITIMACHA TRIBE OF LOUISIANA ET AL. *v.* HARRY L. LAWS CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 690 F. 2d 1157.

No. 82-1676. SOVEREIGN NEWS CO. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 690 F. 2d 569.

No. 82-1685. MULTISTATE LEGAL STUDIES, INC. *v.* LADD, REGISTER OF COPYRIGHTS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 692 F. 2d 478.

No. 82-1687. WUAGNEUX *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 683 F. 2d 1343.

No. 82–1692. ARGENTO ET AL. *v.* LENARD. C. A. 7th Cir. Certiorari denied. Reported below: 699 F. 2d 874.

No. 82–1698. NEVIN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 696 F. 2d 1229.

No. 82–1713. FRAME ET AL. *v.* SOUTH BEND COMMUNITY SCHOOL CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 696 F. 2d 998.

No. 82–1725. MASSACHUSETTS *v.* GAGNON ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 387 Mass. 768, 443 N. E. 2d 407.

No. 82–1731. HERZFELD ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO ET AL.;

No. 82–1732. BROWN ET AL. *v.* PARKER ET AL.; and

No. 82–1815. EKEN ET AL. *v.* INTERNATIONAL MINING EXCHANGE, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 699 F. 2d 503.

No. 82–1754. MARITIME INTERNATIONAL NOMINEES ESTABLISHMENT *v.* REPUBLIC OF GUINEA ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 224 U. S. App. D. C. 119, 693 F. 2d 1094.

No. 82–1760. HEALTH CARE PLAN OF NEW JERSEY, INC. *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 707 F. 2d 1391.

No. 82–1767. HATTERAS, INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 698 F. 2d 1215.

No. 82–1768. COMMONWEALTH EDISON CO. *v.* GETTO. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 109 Ill. App. 3d 498, 440 N. E. 2d 934.

No. 82–1769. LAKEWOOD, OHIO, CONGREGATION OF JEHOVAH'S WITNESSES, INC. *v.* CITY OF LAKEWOOD, OHIO. C. A. 6th Cir. Certiorari denied. Reported below: 699 F. 2d 303.

No. 82–1781. WEBSTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1511.

No. 82–1785. CITADEL CORP. *v.* PUERTO RICO HIGHWAY AUTHORITY ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 695 F. 2d 31.

No. 82–1788. Alabama Power Co. *v.* Nuclear Regulatory Commission et al. C. A. 11th Cir. Certiorari denied. Reported below: 692 F. 2d 1362.

No. 82–1799. Burke *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 700 F. 2d 70.

No. 82–1805. Johnson County Memorial Hospital et al. *v.* Heckler, Secretary of Health and Human Services. C. A. 7th Cir. Certiorari denied. Reported below: 698 F. 2d 1347.

No. 82–1806. Hawaiian Independent Refinery, Inc. *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 697 F. 2d 1063.

No. 82–1807. Shields *v.* United States et al. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 987.

No. 82–1811. Desert Palace, Inc. *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 1229.

No. 82–1812. Fortner *v.* Nebraska. Sup. Ct. Neb. Certiorari denied. Reported below: 213 Neb. xix.

No. 82–1814. City of Fort Lauderdale, Florida *v.* Farmer. Sup. Ct. Fla. Certiorari denied. Reported below: 427 So. 2d 187.

No. 82–1817. Harlaux et al. *v.* Harlaux. Sup. Ct. La. Certiorari denied. Reported below: 426 So. 2d 602.

No. 82–1820. Duerr *v.* Ohio; and

No. 82–6699. Duerr *v.* Ohio. Ct. App. Ohio, Hamilton County. Certiorari denied. Reported below: No. 82–1820, 8 Ohio App. 3d 396, 457 N. E. 2d 834; No. 82–6699, 8 Ohio App. 3d 404, 457 N. E. 2d 843.

No. 82–1823. West Coast Media, Inc. *v.* Federal Communications Commission et al. C. A. D. C. Cir. Certiorari denied. Reported below: 224 U. S. App. D. C. 423, 695 F. 2d 617.

No. 82–1824. Hirschfeld et al. *v.* Dreyer et al. C. A. 9th Cir. Certiorari denied. Reported below: 692 F. 2d 763.

No. 82-1825. FLORIDA TILE CO., A DIVISION OF SIKES CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 692 F. 2d 34.

No. 82-1826. BOND ET AL. *v.* GENERAL MOTORS CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1499.

No. 82-1833. SANTIAGO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 92 App. Div. 2d 618, 459 N. Y. S. 2d 953.

No. 82-1842. WRIGHT *v.* DEFENSE LOGISTICS AGENCY. C. A. 3d Cir. Certiorari denied. Reported below: 707 F. 2d 1398.

No. 82-1843. MERENA *v.* SATO, BUILDING INSPECTOR FOR THE CITY AND COUNTY OF HONOLULU, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 701 F. 2d 185.

No. 82-1844. CENTRAL NATIONAL BANK OF POTEAU, OKLAHOMA *v.* COAL WASHER RENTAL CORP. C. A. 10th Cir. Certiorari denied.

No. 82-1846. ANDREWS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 709 F. 2d 1495.

No. 82-1849. LEONARD B. HEBERT, JR. & CO., INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 696 F. 2d 1120.

No. 82-1851. PENDLETON ET AL. *v.* UNITED PARCEL SERVICE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1506.

No. 82-1854. AVITZUR *v.* AVITZUR. Ct. App. N. Y. Certiorari denied. Reported below: 58 N. Y. 2d 108, 446 N. E. 2d 136.

No. 82-1855. INTERLOX PUNCH & DIE CORP. ET AL. *v.* INSILCO CORP. ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 82-1858. PALMER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 704 F. 2d 723.

No. 82-1864. 131.68 ACRES OF LAND, MORE OR LESS SITUATED IN ST. JAMES PARISH, LOUISIANA, ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 695 F. 2d 872.

No. 82-1867. BEN KOZLOFF, INC. *v.* WELLS FARGO BUSINESS CREDIT. C. A. 5th Cir. Certiorari denied. Reported below: 695 F. 2d 940.

No. 82-1869. LEWY ET AL. *v.* WEINBERGER ET AL.; and

No. 82-2098. COYNE ET AL. *v.* WEINBERGER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 698 F. 2d 61.

No. 82-1871. TEXAS *v.* PLATORO LTD., INC. C. A. 5th Cir. Certiorari denied. Reported below: 695 F. 2d 893.

No. 82-1872. MESSNER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 694 F. 2d 726.

No. 82-1874. DEAKYNE *v.* DEPARTMENT OF THE ARMY CORPS OF ENGINEERS OF THE UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 701 F. 2d 271.

No. 82-1875. CARPET SEAMING TAPE LICENSING CORP. *v.* BEST SEAM, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 694 F. 2d 570.

No. 82-1880. NORRIS INDUSTRIES, INC. *v.* INTERNATIONAL TELEPHONE & TELEGRAPH CORP. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 696 F. 2d 918.

No. 82-1881. DOE *v.* EXECUTIVE SECURITIES CORP., BY MACRAE, AS TRUSTEE. C. A. 2d Cir. Certiorari denied. Reported below: 702 F. 2d 406.

No. 82-1883. FEHLHABER, AS PERSONAL REPRESENTATIVE OF FEHLHABER *v.* FEHLHABER. C. A. 11th Cir. Certiorari denied. Reported below: 681 F. 2d 1015 and 702 F. 2d 81.

No. 82-1884. MORALES *v.* NEW YORK UNIVERSITY ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 91 App. Div. 2d 873, 458 N. Y. S. 2d 432.

No. 82-1886. BERRY *v.* BERGER. C. A. D. C. Cir. Certiorari denied.

No. 82-1892. HAYES OILFIELD CONSTRUCTION CO., INC. *v.* UNITED STATES FIDELITY & GUARANTY CO. C. A. 5th Cir. Certiorari denied. Reported below: 693 F. 2d 489.

No. 82-1893. CLARK, A MINOR, BY CLARK, ET AL. *v.* ARIZONA INTERSCHOLASTIC ASSN. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 695 F. 2d 1126.

No. 82-1894. ALDRICH *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 232 Kan. 783, 658 P. 2d 1027.

No. 82-1897. FIRST CATHOLIC SLOVAK LADIES ASSN. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 694 F. 2d 1068.

No. 82-1898. KONDRAT *v.* SCHAEFER ET AL. Ct. App. Ohio, Lake County. Certiorari denied.

No. 82-1900. SIANO *v.* JUSTICES OF MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 698 F. 2d 52.

No. 82-1901. SIANO *v.* UNITED STATES FIDELITY & GUARANTY CO. ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 388 Mass. 1102, 445 N. E. 2d 156.

No. 82-1903. O'BRIEN *v.* WILCOX & SCHLOSSER CO., L.P.A. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 82-1904. WATSON ET AL. *v.* BARTLETT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 701 F. 2d 171.

No. 82-1905. SUN CHEMICAL CORP., SUCCESSOR IN INTEREST BY MERGER TO KOLLSMAN INSTRUMENT CORP. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 698 F. 2d 1203.

No. 82-1906. LACLEDE GAS CO. *v.* OFFICE OF PUBLIC COUNSEL OF MISSOURI ET AL. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 645 S. W. 2d 39.

No. 82-1907. MISSISSIPPI POWER CO. *v.* MISSISSIPPI PUBLIC SERVICE COMMISSION ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 429 So. 2d 883.

No. 82-1908. CARDOSA ET AL. *v.* MORALES. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 82-1910. ANCHOR MOTOR FREIGHT, INC. *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL UNION NO. 377, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 700 F. 2d 1067.

No. 82-1914. FALKOWSKI *v.* PERRY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 691 F. 2d 510.

No. 82-1915. CALIFORNIA *v.* HARVIER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 700 F. 2d 1217.

No. 82-1917. GARY AIRCRAFT CORP. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 698 F. 2d 775.

No. 82-1918. NORMAN ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 701 F. 2d 295.

No. 82-1919. ROWAN COS., INC., ET AL. *v.* MARATHON PIPELINE CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 699 F. 2d 240.

No. 82-1920. ALABAMA *v.* GORDON, JUDGE, CIRCUIT COURT OF MONTGOMERY (ELEY, REAL PARTY IN INTEREST). Ct. Crim. App. Ala. Certiorari denied.

No. 82-1921. KAUSHIVA *v.* HUTTER. Ct. App. D. C. Certiorari denied. Reported below: 454 A. 2d 1373.

No. 82-1923. CALIFORNIA *v.* CARROLL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 140 Cal. App. 3d 135, 189 Cal. Rptr. 327.

No. 82-1927. FLORIDA *v.* GRAGG. Sup. Ct. Fla. Certiorari denied. Reported below: 429 So. 2d 1204.

No. 82-1929. EISENBEISS *v.* JARRELL ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 52 Md. App. 677, 451 A. 2d 940.

No. 82-1931. MESIROW ET AL. *v.* PEPPERIDGE FARM, INC. C. A. 9th Cir. Certiorari denied. Reported below: 703 F. 2d 339.

No. 82-1932. BILLUPS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 692 F. 2d 320.

No. 82-1935. DEMYAN'S HOFBRAU, INC. *v.* INA UNDERWRITERS INSURANCE CO. C. A. 2d Cir. Certiorari denied. Reported below: 718 F. 2d 1085.

No. 82-1936. RODRIGUEZ *v.* FLOTA MERCANTE GRANCOLOMBIANA, S.A., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 703 F. 2d 1069.

No. 82-1939. DIXON *v.* DIXON. Sup. Ct. Ga. Certiorari denied.

No. 82-1942. HOFFMAN *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 82-1943. JOSEPH GANN, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir. Certiorari denied. Reported below: 701 F. 2d 3.

No. 82-1945. OCEANIC CONTRACTORS, INC., ET AL. *v.* CORMIER. C. A. 5th Cir. Certiorari denied. Reported below: 696 F. 2d 1112.

No. 82-1948. CANTRELL *v.* ROSA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROSA, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 705 F. 2d 1208.

No. 82-1949. SHAFF *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 695 F. 2d 1138.

No. 82-1950. CHURCH OF CHRIST OF COLLINSVILLE, OKLAHOMA, ET AL. *v.* GRAHAM, JUDGE OF THE FOURTEENTH JUDICIAL DISTRICT OF OKLAHOMA, ET AL. Sup. Ct. Okla. Certiorari denied.

No. 82-1952. BALK *v.* UNITED STATES INFORMATION AGENCY. C. A. D. C. Cir. Certiorari denied. Reported below: 227 U. S. App. D. C. 164, 704 F. 2d 1293.

No. 82-1953. PRIDE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 705 F. 2d 448.

No. 82-1954. ABADI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 706 F. 2d 178.

No. 82-1956. MORNINGSTAR *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 428 So. 2d 220.

No. 82-1960. BRENNAN ET AL. *v.* CITY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 138 Cal. App. 3d 114, 187 Cal. Rptr. 667.

No. 82-1962. STEELE *v.* LAMAR. C. A. 5th Cir. Certiorari denied. Reported below: 693 F. 2d 559 and 698 F. 2d 1286.

No. 82-1963. HERBERT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 981.

No. 82–1964. CONIGLIO *v.* WARDEN, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 1441.

No. 82–1965. WYNSHAW *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 697 F. 2d 85.

No. 82–1966. SIMUTIS, INDIVIDUALLY, AND AS CONSUL GENERAL OF REPUBLIC OF LITHUANIA AT NEW YORK, NEW YORK *v.* DANIUNAS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 1443.

No. 82–1967. ZIRPOLO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 704 F. 2d 23.

No. 82–1968. ARKLA, INC., FORMERLY ARKANSAS LOUISIANA GAS CO. *v.* HALL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 691 F. 2d 1184 and 700 F. 2d 218.

No. 82–1969. KLAMATH-LAKE PHARMACEUTICAL ASSN. *v.* KLAMATH MEDICAL SERVICE BUREAU ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 701 F. 2d 1276.

No. 82–1972. HOCHANADEL *v.* DETCO TRAILER, INC., ET AL. Ct. App. Kan. Certiorari denied. Reported below: 8 Kan. App. 2d xv, 656 P. 2d 801.

No. 82–1973. BRISTER ET AL. *v.* PARISH OF JEFFERSON, LOUISIANA, ET AL. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 424 So. 2d 440.

No. 82–1978. SIMPSON *v.* PENNSYLVANIA ET AL. Pa. Commw. Ct. Certiorari denied. Reported below: 69 Pa. Commw. 120, 450 A. 2d 305.

No. 82–1979. WOODSIDE *v.* POSTMASTER GENERAL OF THE UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 709 F. 2d 1497.

No. 82–1980. SMITH *v.* HARMSEN ET AL.; and

No. 82–1982. SHANNON ET AL. *v.* HARMSEN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 693 F. 2d 932.

No. 82–1981. MONTEMAYOR ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 703 F. 2d 109.

No. 82–1985. COSOFF ET AL. *v.* RODMAN, AS TRUSTEE OF W. T. GRANT CO., BANKRUPT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 699 F. 2d 599.

No. 82-1987. FERRIS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 700 F. 2d 1.

No. 82-1989. BRUMMER, PUBLIC DEFENDER OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, ET AL. *v.* FLORIDA EX REL. SMITH, ATTORNEY GENERAL OF FLORIDA, ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 426 So. 2d 532.

No. 82-1991. SCHWARZ *v.* COASTAL RESOURCES MANAGEMENT ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 705 F. 2d 439.

No. 82-1992. ARTIC INTERNATIONAL, INC. *v.* MIDWAY MANUFACTURING CO. C. A. 7th Cir. Certiorari denied. Reported below: 704 F. 2d 1009.

No. 82-1995. NEMBHARD ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1512.

No. 82-1996. CHASE FOUNDRY & MANUFACTURING CO. *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied. Reported below: 8 Ohio App. 3d 96, 456 N. E. 2d 528.

No. 82-1999. CHAVEZ *v.* SMITH, ATTORNEY GENERAL OF FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 695 F. 2d 565.

No. 82-2000. GREEN *v.* GREEN ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 82-2001. VANDER JAGT ET AL. *v.* O'NEILL ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 226 U. S. App. D. C. 14, 699 F. 2d 1166.

No. 82-2002. H. J. JUSTIN & SONS, INC., DBA JUSTIN BOOT CO. *v.* DEUKMEJIAN, GOVERNOR OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 702 F. 2d 758.

No. 82-2004. NIBUNGCO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 707 F. 2d 1396.

No. 82-2009. DILL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 699 F. 2d 18.

No. 82-2010. KUELLMAR ET UX. *v.* VILLAGE OF BROOKFIELD. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 110 Ill. App. 3d 1201, 454 N. E. 2d 1209.

No. 82-2012. EHLERS *v.* CITY OF DECATUR, GEORGIA. C. A. 11th Cir. Certiorari denied. Reported below: 696 F. 2d 1006.

No. 82-2014. SOUTH PARK INDEPENDENT SCHOOL DISTRICT *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 699 F. 2d 1291.

No. 82-2018. MERRILL LYNCH, PIERCE, FENNER & SMITH INC. *v.* MALANDRIS. C. A. 10th Cir. Certiorari denied. Reported below: 703 F. 2d 1152.

No. 82-2020. HOVSEPIAN, AKA HUGHES *v.* NEFF, INDEPENDENT EXECUTOR OF THE ESTATE OF LUMMIS, ET AL. Ct. App. Tex., 14th Sup. Jud. Dist. Certiorari denied.

No. 82-2021. MARSH *v.* CITY OF OAKLAND. C. A. 9th Cir. Certiorari denied. Reported below: 705 F. 2d 467.

No. 82-2022. BEIL *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 110 Ill. App. 3d 291, 442 N. E. 2d 291.

No. 82-2023. ASHE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 707 F. 2d 519.

No. 82-2024. EARLY ET AL. *v.* EASTERN TRANSFER ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 699 F. 2d 552.

No. 82-2025. TEAL *v.* MORRISON-KNUDSEN CO., INC. C. A. D. C. Cir. Certiorari denied. Reported below: 224 U. S. App. D. C. 161, 694 F. 2d 281.

No. 82-2026. WESTON *v.* BACHMAN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 705 F. 2d 465.

No. 82-2027. SCHMIDT *v.* IOWA ET AL. C. A. 8th Cir. Certiorari denied.

No. 82-2029. FAKIER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 701 F. 2d 188.

No. 82-2031. CASE ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 699 F. 2d 18.

No. 82-2032. NEDECZKY *v.* OHIO. Ct. App. Ohio, Greene County. Certiorari denied.

No. 82-2033. ASSOCIATED BUILDERS & CONTRACTORS, NORTHERN CALIFORNIA CHAPTER, ET AL. *v.* CARPENTERS VACATION & HOLIDAY TRUST FUND FOR NORTHERN CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 700 F. 2d 1269.

No. 82-2035. JACKSON *v.* HANDLEY ET AL. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 456 A. 2d 852.

No. 82-2036. BERGMAN *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 706 F. 2d 319.

No. 82-2037. CASTANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 696 F. 2d 1006.

No. 82-2038. SALSBURY, AS PARENT, NATURAL GUARDIAN, AND ADMINISTRATOR OF THE ESTATE OF SALSBURY *v.* ERIE COUNTY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 707 F. 2d 1403.

No. 82-2039. O'NEILL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 1440.

No. 82-2041. JOHNSON *v.* PEREZ, DIRECTOR, SOCIAL SERVICES AGENCY, ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 82-2043. WALSH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 700 F. 2d 846.

No. 82-2044. WESTERN FOOD EQUIPMENT CO. *v.* FOSS AMERICA, INC. C. A. 9th Cir. Certiorari denied. Reported below: 696 F. 2d 1002.

No. 82-2045. COMMITTEE TO PRESERVE AMERICAN COLOR TELEVISION, AKA COMPACT, ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 706 F. 2d 1574.

No. 82-2046. UNITED TRANSPORTATION UNION *v.* SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY ET AL. Sp. Ct. R. R. R. A. Certiorari denied.

No. 82-2047. LATIN BELLY, LTD., ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 718 F. 2d 1084.

No. 82-2048. MEEKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 701 F. 2d 685.

No. 82-2050. BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA *v.* LINCOLN. C. A. 11th Cir. Certiorari denied. Reported below: 697 F. 2d 928.

No. 82-2052. DEFEX *v.* PAN AMERICAN WORLD AIRWAYS, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 1442.

No. 82-2055. BLANTON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 278 S. C. 597, 300 S. E. 2d 286.

No. 82-2057. LESIAK *v.* FERGUSON, AUDITOR OF THE STATE OF OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Reported below: 4 Ohio App. 3d 244, 448 N. E. 2d 168.

No. 82-2060. FIDELITY CONSTRUCTION CO. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 700 F. 2d 1379.

No. 82-2062. CHICK KAM CHOO, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF LEONG CHONG, ET AL. *v.* ESSO OIL CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 699 F. 2d 693.

No. 82-2063. AHMED ET AL. *v.* AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION & INDEMNITY ASSN., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 701 F. 2d 824.

No. 82-2064. QUALITY FORD, INC., ET AL. *v.* FORD MOTOR CO. ET AL. C. A. 10th Cir. Certiorari denied.

No. 82-2065. RUST *v.* RUVOLO ET AL. Ct. App. Ohio, Lucas County. Certiorari denied.

No. 82-2066. SOUTHTRUST BANK OF ALABAMA, BIRMINGHAM *v.* VISA, U.S.A., INC. C. A. Fed. Cir. Certiorari denied. Reported below: 696 F. 2d 1371.

No. 82-2067. GALANTY *v.* CHRYSLER CORP. ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 82-2068. SUTTON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 227 U. S. App. D. C. 18, 702 F. 2d 1206.

No. 82–2069. COX *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 696 F. 2d 1294.

No. 82–2071. DREY ET UX. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 705 F. 2d 965.

No. 82–2073. DEMOS *v.* COMMERCIAL UNION INSURANCE CO., INC. C. A. 7th Cir. Certiorari denied. Reported below: 705 F. 2d 461.

No. 82–2074. CHARAPATA ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 701 F. 2d 186.

No. 82–2076. TOWNER ET AL. *v.* VANDERBILT UNIVERSITY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 728.

No. 82–2078. HACKFORD ET AL. *v.* FIRST SECURITY BANK OF UTAH, N.A. C. A. 10th Cir. Certiorari denied.

No. 82–2080. HESS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 279 S. C. 14, 301 S. E. 2d 547.

No. 82–2081. OCEAN SANDS HOLDING CORP. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 701 F. 2d 167.

No. 82–2084. PHILLIPPI ET UX. *v.* BECHTEL ASSOCIATES PROFESSIONAL CORP., D.C., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 227 U. S. App. D. C. 18, 702 F. 2d 1206.

No. 82–2085. JOINT COUNCIL OF TEAMSTERS NO. 42 ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 702 F. 2d 168.

No. 82–2086. DIRECTOR OF THE CALIFORNIA STATE DEPARTMENT OF SOCIAL SERVICES *v.* ZAPATA ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 137 Cal. App. 3d 858, 187 Cal. Rptr. 351.

No. 82–2087. BROWN *v.* CITY OF ATLANTA. Ct. App. Ga. Certiorari denied. Reported below: 165 Ga. App. 310, 299 S. E. 2d 101.

No. 82–2089. BEAUSANG ET AL. *v.* MULLEN. C. A. 8th Cir. Certiorari denied. Reported below: 705 F. 2d 971.

No. 82-2090. BISSETTE *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 279 S. C. 98, 302 S. E. 2d 344.

No. 82-2093. BUDDE *v.* KENTRON HAWAII, LTD., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 703 F. 2d 456.

No. 82-2097. LUIGI MARRE LAND & CATTLE CO. *v.* PACIFIC GAS & ELECTRIC CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 701 F. 2d 185.

No. 82-2101. CAMER ET AL. *v.* EIKENBERRY, ATTORNEY GENERAL OF WASHINGTON, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 703 F. 2d 574.

No. 82-2102. QUALITY PACKAGING SUPPLY CORP. ET AL. *v.* CITY OF ROCHESTER ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 58 N. Y. 2d 316, 448 N. E. 2d 98.

No. 82-2103. UNIVERSAL RESTAURANTS, INC. *v.* FELLOWS. C. A. 5th Cir. Certiorari denied. Reported below: 701 F. 2d 447.

No. 82-2104. GRACE *v.* WESTERN CONTRACTING CORP. Ct. App. Mich. Certiorari denied.

No. 82-2106. LAMPKIN *v.* NORTH AMERICAN FINANCE CO. Sup. Ct. Miss. Certiorari denied. Reported below: 427 So. 2d 972.

No. 82-2108. PORTER *v.* UNITED STATES; and
No. 82-2121. ZANG *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 703 F. 2d 1186.

No. 82-2109. PB *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 709 F. 2d 1494.

No. 82-2110. BEST *v.* EAGERTON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 696 F. 2d 1282.

No. 82-2111. SHAPIRO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 699 F. 2d 1164.

No. 82-2112. RUIZ *v.* CRISTO REY COMMUNITY CENTER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1507.

No. 82-2114. FRANS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 697 F. 2d 188.

No. 82-2118. LASK ET AL. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 703 F. 2d 293.

No. 82-2119. FADELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 696 F. 2d 997.

No. 82-2122. THOMPSON ET AL. *v.* NELSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1509.

No. 82-2123. PLACHTER ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 709 F. 2d 1496.

No. 82-2126. MARRIOTT IN-FLITE SERVICES, A DIVISION OF MARRIOTT CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 1441.

No. 82-2127. MERTSCHING *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 704 F. 2d 505.

No. 82-2131. MILES ET AL. *v.* NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND EMPLOYEE PENSION BENEFIT PLAN. C. A. 2d Cir. Certiorari denied. Reported below: 698 F. 2d 593.

No. 82-2133. MINCH *v.* CITY OF FARGO. Sup. Ct. N. D. Certiorari denied. Reported below: 332 N. W. 2d 71.

No. 82-2135. WAGNER *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 82-2136. FREZZO BROTHERS, INC., ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 703 F. 2d 62.

No. 82-2137. JBL ENTERPRISES, INC., ET AL. *v.* JHIRMACK ENTERPRISES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 1011.

No. 82-2138. WOLFGRAM, NEXT FRIEND OF WOLFGRAM, ET AL. *v.* BOMBARDIER LTD. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 460.

No. 82-2141. CHEREN *v.* BECHTEL INC. ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 90 App. Div. 2d 710, 455 N. Y. S. 2d 1015.

No. 82-2142. YEE *v.* YEE ET AL. Sup. Ct. Haw. Certiorari denied.

No. 82-2143. BURLINGTON NORTHERN INC., SUCCESSOR BY MERGER TO ST. LOUIS-SAN FRANCISCO RAILWAY CO. *v.* BAIR. Sup. Ct. Mo. Certiorari denied. Reported below: 647 S. W. 2d 507.

No. 82-2144. WOODRUFF ET UX. *v.* ANGUS, NEXT FRIEND OF ANGUS, ET AL. Ct. App. Ore. Certiorari denied. Reported below: 60 Ore. App. 546, 655 P. 2d 208.

No. 82-2145. HOLTON, CHIEF INVESTIGATOR, SELECT COMMITTEE ON AGING, U. S. HOUSE OF REPRESENTATIVES, ET AL. *v.* BENFORD. C. A. 4th Cir. Certiorari denied. Reported below: 707 F. 2d 504.

No. 82-2150. PLATT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 706 F. 2d 1498.

No. 82-2152. ST. JAMES HOSPITAL *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 7th Cir. Certiorari denied. Reported below: 698 F. 2d 1337.

No. 82-2153. NATIONAL FOUNDATION FOR CANCER RESEARCH, INC. *v.* COUNCIL OF BETTER BUSINESS BUREAUS, INC. C. A. 4th Cir. Certiorari denied. Reported below: 705 F. 2d 98.

No. 82-2154. MONTGOMERY MALL LIMITED PARTNERSHIP *v.* GENERAL ELECTRIC CREDIT CORP. C. A. 10th Cir. Certiorari denied. Reported below: 704 F. 2d 1173.

No. 82-2155. ESCAMBIA COUNTY, FLORIDA, ET AL. *v.* MCMILLAN ET AL. C. A. 11th Cir. Certiorari before judgment denied.

No. 82-2158. WARREN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 705 F. 2d 462.

No. 82-2159. B. D. INTERNATIONAL DISCOUNT CORP. *v.* CHASE MANHATTAN BANK, N.A. C. A. 2d Cir. Certiorari denied. Reported below: 701 F. 2d 1071.

No. 82-2160. SPARANO *v.* SECRETARY OF THE ARMY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 709 F. 2d 1495.

No. 82-2161. HICKS *v.* APEX MARINE CORP. C. A. 4th Cir. Certiorari denied. Reported below: 705 F. 2d 443.

No. 82-2162. SAFECARD SERVICES, INC. *v.* DOW JONES & CO., INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 705 F. 2d 445.

No. 82-2165. LEVINE ET AL. *v.* SILSDORF. Ct. App. N. Y. Certiorari denied. Reported below: 59 N. Y. 2d 8, 449 N. E. 2d 716.

No. 82-6186. DOBSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 449 A. 2d 1082.

No. 82-6255. SMITH, AKA EL-AMIN *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 707 F. 2d 1395.

No. 82-6296. MOSCHIANO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 695 F. 2d 236.

No. 82-6405. MCMANNIS *v.* MOHN, ACTING SUPERINTENDENT, WEST VIRGINIA PENITENTIARY. Sup. Ct. App. W. Va. Certiorari denied.

No. 82-6413. JULIAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 685 F. 2d 448.

No. 82-6428. FRANKLIN *v.* KROGER CO. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 723.

No. 82-6450. HARRIS *v.* QUINLAN, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 722 F. 2d 727.

No. 82-6485. BONDS *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 98 Wash. 2d 1, 653 P. 2d 1024.

No. 82-6500. MINICK *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 455 A. 2d 874.

No. 82-6538. WRIGHT *v.* GRIFFIN, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 82-6542. HAMPTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 701 F. 2d 186.

No. 82-6562. LOPEZ *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 99 N. M. 385, 658 P. 2d 460.

No. 82-6564. SMITH *v.* MAGGIO, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 696 F. 2d 365.

No. 82–6570. KNIGHT *v.* JOHNSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 699 F. 2d 162.

No. 82–6589. COOK *v.* UNITED STATES DEPARTMENT OF LABOR. C. A. 9th Cir. Certiorari denied. Reported below: 688 F. 2d 669.

No. 82–6592. SMITH *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTIONS. C. A. 8th Cir. Certiorari denied. Reported below: 697 F. 2d 267.

No. 82–6600. MOLLOHAN *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 82–6601. MATTESON *v.* OREGON STATE PENITENTIARY, CORRECTIONS DIVISION. Ct. App. Ore. Certiorari denied. Reported below: 60 Ore. App. 329, 653 P. 2d 1023.

No. 82–6604. DORSEY *v.* MAGGIO, WARDEN, LOUISIANA STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied.

No. 82–6610. COLEMAN *v.* MCCARTHY, SUPERINTENDENT OF THE CALIFORNIA MEN'S COLONY. C. A. 9th Cir. Certiorari denied.

No. 82–6619. DAVID *v.* ATTORNEY GENERAL OF THE UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 699 F. 2d 411.

No. 82–6621. DEAVERS *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 109 Ill. App. 3d 1221, 451 N. E. 2d 1045.

No. 82–6636. POWELL *v.* U. S. BUREAU OF PRISONS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 695 F. 2d 868.

No. 82–6637. BLYDEN *v.* GOVERNMENT OF THE VIRGIN ISLANDS; and
No. 82–6790. GEORGE *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 699 F. 2d 121.

No. 82–6655. FORD *v.* ISRAEL ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 701 F. 2d 689.

No. 82-6672. VANCE *v.* BORDENKIRCHER, WARDEN, WEST VIRGINIA STATE PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 692 F. 2d 978.

No. 82-6676. HANNAN *v.* SECRETARY OF THE ARMY ET AL. C. A. 10th Cir. Certiorari denied.

No. 82-6678. EVERETT *v.* BEARD. C. A. 10th Cir. Certiorari denied.

No. 82-6682. HUDSON *v.* BRIERTON, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 699 F. 2d 917.

No. 82-6683. GREGORY *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 327 N. W. 2d 218 and 331 N. W. 2d 140.

No. 82-6692. BORSARI *v.* FEDERAL AVIATION ADMINISTRATION. C. A. 2d Cir. Certiorari denied. Reported below: 699 F. 2d 106.

No. 82-6701. CLEMENTI *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 722 F. 2d 727.

No. 82-6709. BORRELLI *v.* CICCITTO ET AL. C. A. 3d Cir. Certiorari denied.

No. 82-6712. HOWARD *v.* PAXSON ET AL. C. A. 5th Cir. Certiorari denied.

No. 82-6714. ARANGO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 58 N. Y. 2d 1116, 449 N. E. 2d 758.

No. 82-6716. ADAMSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 700 F. 2d 953.

No. 82-6723. LATCHIS *v.* COMMISSIONER OF INTERNAL REVENUE ET AL. C. A. 9th Cir. Certiorari denied.

No. 82-6727. VAN DYKE *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 110 Wis. 2d 741, 330 N. W. 2d 247.

No. 82-6730. CURTIS *v.* HECKEL, WARDEN, VANDALIA CORRECTIONAL CENTER. C. A. 7th Cir. Certiorari denied. Reported below: 705 F. 2d 462.

No. 82-6731. HOLLEMAN *v.* DUCKWORTH ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 700 F. 2d 391.

No. 82-6734. MILLER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 82-6735. OWENS *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 698 F. 2d 1111.

No. 82-6736. WRIGHT *v.* ASSOCIATES FINANCIAL SERVICES COMPANY OF OREGON, INC. Ct. App. Ore. Certiorari denied. Reported below: 59 Ore. App. 688, 651 P. 2d 1368.

No. 82-6737. KNAPP *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 111 Wis. 2d 704, 333 N. W. 2d 729.

No. 82-6738. LUERA *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTION. Ct. Crim. App. Tex. Certiorari denied.

No. 82-6739. ARELLANES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 701 F. 2d 184.

No. 82-6742. ADKINS *v.* HOPPER, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 82-6744. PRASAD *v.* WASSAIC DEVELOPMENTAL CENTER ET AL. C. A. 2d Cir. Certiorari denied.

No. 82-6747. GIL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 694 F. 2d 670.

No. 82-6748. HARDING *v.* GARRISON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 705 F. 2d 443.

No. 82-6751. SPINNEY *v.* MASSACHUSETTS. C. A. 1st Cir. Certiorari denied.

No. 82-6754. SUMLIN *v.* ENGLE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1508.

No. 82-6755. PALMER *v.* MINTZES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1506.

No. 82-6756. O'DILLON *v.* ZANT, WARDEN. Super. Ct. Ga., Butts County. Certiorari denied.

No. 82-6757. FRIEDMAN *v.* OHIO DEPARTMENT OF HEALTH. Sup. Ct. Ohio. Certiorari denied.

No. 82-6759. SALINAS ET AL. *v.* BRIER, POLICE CHIEF OF THE CITY OF MILWAUKEE. C. A. 7th Cir. Certiorari denied. Reported below: 695 F. 2d 1073.

No. 82-6760. RUDOLPH *v.* LOCKE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 703 F. 2d 580.

No. 82-6761. LEE *v.* DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 58 N. Y. 2d 604, 445 N. E. 2d 654.

No. 82-6766. PAUL *v.* HENDERSON, SUPERINTENDENT OF AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 698 F. 2d 589.

No. 82-6767. CHRISTENSON *v.* HEADLEY, SUPERINTENDENT OF BEDFORD HILLS CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 722 F. 2d 727.

No. 82-6770. BROWN *v.* MARSHALL. C. A. 6th Cir. Certiorari denied. Reported below: 704 F. 2d 333.

No. 82-6772. GUY *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1502.

No. 82-6774. BRODNEX *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 82-6776. WEAVER *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 305 Pa. Super. 632, 450 A. 2d 1069.

No. 82-6779. HENRY *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 278 Ark. 478, 647 S. W. 2d 419.

No. 82-6781. SIMMONS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 226 U. S. App. D. C. 98, 699 F. 2d 1250.

No. 82-6782. VUKSTA *v.* BETHLEHEM STEEL CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 707 F. 2d 1405.

No. 82-6784. STOKES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 698 F. 2d 1236.

No. 82-6785. RONAN *v.* BRIGGS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 691 F. 2d 510.

No. 82-6786. PITTMAN *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 428 So. 2d 979.

No. 82-6787. GANT *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 649 S. W. 2d 30.

No. 82-6792. GANCI *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 82-6793. HALL *v.* CUYLER ET AL. C. A. 3d Cir. Certiorari denied.

No. 82-6801. PARKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 699 F. 2d 177.

No. 82-6803. ROBINSON *v.* JOHNSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 701 F. 2d 167.

No. 82-6804. WINTREY *v.* BREED, T/A BREED & ASSOCIATES, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 696 F. 2d 987.

No. 82-6807. JACKSON *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 295 Md. 530.

No. 82-6809. ROSE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 695 F. 2d 1356.

No. 82-6813. BROWN *v.* BALILES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 707 F. 2d 505.

No. 82-6814. DOMINIQUE *v.* GREER, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 703 F. 2d 572.

No. 82-6817. MOTTOLA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 92 App. Div. 2d 876, 459 N. Y. S. 2d 953.

No. 82-6819. NELL *v.* DUNHAM, SUPERINTENDENT, ARTHUR KILL CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 722 F. 2d 728.

No. 82-6820. STOKES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 703 F. 2d 572.

No. 82–6822. V. J. S. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 107 Ill. App. 3d 1171, 441 N. E. 2d 187.

No. 82–6824. AILLON *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 189 Conn. 416, 456 A. 2d 279.

No. 82–6826. FORBES *v.* WADDINGTON ET AL. Sup. Ct. Cal. Certiorari denied.

No. 82–6828. MCCARTHY *v.* MCCARTHY, SUPERINTENDENT, CALIFORNIA MEN'S COLONY. Sup. Ct. Cal. Certiorari denied.

No. 82–6829. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1512.

No. 82–6831. MARTINEZ *v.* WINANS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 82–6833. LITTLETON *v.* WOLFF, WARDEN, NEVADA STATE PRISON, ET AL. C. A. 9th Cir. Certiorari denied.

No. 82–6835. LETENDRE *v.* FUGATE, JUDGE, LEE COUNTY GENERAL DISTRICT COURT, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 701 F. 2d 1093.

No. 82–6836. BICE-BEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 701 F. 2d 1086.

No. 82–6837. LACOUR ET AL. *v.* WEST ET AL. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 412 So. 2d 135.

No. 82–6838. HALE *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 82–6841. HARGER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 665 P. 2d 827.

No. 82–6842. HUANG *v.* BERNSTEIN ET AL. Ct. App. D. C. Certiorari denied.

No. 82–6843. KING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 703 F. 2d 119.

No. 82–6844. MARATTY *v.* SOWDERS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1505.

No. 82-6845. VARELLA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 692 F. 2d 1352.

No. 82-6846. SCHULZ *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of San Diego. Certiorari denied.

No. 82-6849. REESE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 456 So. 2d 341.

No. 82-6851. BOWLES *v.* FARRIS ET AL. C. A. 10th Cir. Certiorari denied.

No. 82-6853. PRESLEY *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 701 F. 2d 188.

No. 82-6855. BEDORTHA *v.* CUPP, SUPERINTENDENT, OREGON STATE PENITENTIARY. Sup. Ct. Ore. Certiorari denied. Reported below: 294 Ore. 491, 660 P. 2d 681.

No. 82-6856. DONALDSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 451 A. 2d 51.

No. 82-6860. BOYD *v.* SHAWNEE MISSION PUBLIC SCHOOLS, UNIFIED SCHOOL DISTRICT NO. 512, JOHNSON COUNTY, KANSAS. C. A. 10th Cir. Certiorari denied.

No. 82-6864. O'KELLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 701 F. 2d 758.

No. 82-6866. TONEMAN *v.* BURKHART. C. A. 4th Cir. Certiorari denied. Reported below: 707 F. 2d 510.

No. 82-6867. TRAPNELL *v.* O'BRIEN, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 82-6868. JOHNSON *v.* PARKS, WARDEN, KENTUCKY STATE PENITENTIARY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1504.

No. 82-6869. BLACK *v.* BARANY ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 82-6871. ANDERSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 704 F. 2d 117.

No. 82-6872. BRIDGES *v.* TEXAS. Ct. App. Tex., 12th Sup. Jud. Dist. Certiorari denied. Reported below: 656 S. W. 2d 505.

No. 82–6873. LEE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 695 F. 2d 515.

No. 82–6874. HARSHMAN ET AL. *v.* PETROLITE CORP. C. A. 5th Cir. Certiorari denied. Reported below: 701 F. 2d 946.

No. 82–6877. FEROLA *v.* MORAN. C. A. 1st Cir. Certiorari denied.

No. 82–6879. JOHNSON *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 11th Cir. Certiorari denied.

No. 82–6880. KING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 703 F. 2d 578.

No. 82–6882. THOMAS *v.* UNITED STEELWORKERS OF AMERICA, LOCAL 3754, AFL–CIO. C. A. 1st Cir. Certiorari denied.

No. 82–6884. LONG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 82–6885. FREED *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 703 F. 2d 394.

No. 82–6886. ILLSLEY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 705 F. 2d 440.

No. 82–6888. KAPLAN *v.* OFFICE OF THE U. S. ATTORNEY FOR THE DISTRICT OF NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 696 F. 2d 983.

No. 82–6891. HOWARD *v.* TAYLOR ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 705 F. 2d 443.

No. 82–6892. VETETO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 701 F. 2d 136.

No. 82–6893. REED *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 452 A. 2d 1173.

No. 82–6894. JAMES *v.* MARTIN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 707 F. 2d 507.

No. 82–6895. GOODMAN, BY GOODMAN, HER FATHER AND NEXT FRIEND *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied.

No. 82–6896. LYMON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1510.

No. 82-6897. Holcomb *v.* California et al. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 1230.

No. 82-6898. Williams *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1513.

No. 82-6899. Robinson *v.* Dawson, Judge, U. S. Tax Court. C. A. 10th Cir. Certiorari denied.

No. 82-6904. Johnson *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 701 F. 2d 752.

No. 82-6905. Hamb *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 109 Ill. App. 3d 1211, 451 N. E. 2d 1039.

No. 82-6908. Callahan *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 702 F. 2d 964.

No. 82-6911. Logarusic *v.* United States;
No. 82-6925. Bagaric *v.* United States; and
No. 82-6941. Sudar *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 706 F. 2d 42.

No. 82-6914. Harvey *v.* Anderson et al. C. A. 5th Cir. Certiorari denied. Reported below: 707 F. 2d 513.

No. 82-6917. Hawkins *v.* United States. Ct. App. D. C. Certiorari denied.

No. 82-6918. Wise *v.* Smyser, United States Magistrate. C. A. 3d Cir. Certiorari denied.

No. 82-6921. Maschi *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 1440.

No. 82-6924. Ingraham *v.* McCarthy et al. C. A. 1st Cir. Certiorari denied.

No. 82-6926. Dowdy *v.* Ohio. Sup. Ct. Ohio. Certiorari denied.

No. 82-6927. Garcia *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 1440.

No. 82-6928. Dodson *v.* Illinois. Sup. Ct. Ill. Certiorari denied.

No. 82-6929. FEARS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 82-6930. RANDALL *v.* POSNER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 701 F. 2d 185.

No. 82-6931. McCLURE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 648 S. W. 2d 667.

No. 82-6932. MEADOR *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied.

No. 82-6934. RAMON-PEREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 703 F. 2d 1231.

No. 82-6936. VANDA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 111 Ill. App. 3d 551, 444 N. E. 2d 609.

No. 82-6938. SPOTVILLE *v.* MAGGIO, WARDEN, LOUISIANA STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied.

No. 82-6940. WHALEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 707 F. 2d 521.

No. 82-6943. ENGEL *v.* NEW YORK STATE HUMAN RIGHTS APPEAL BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 722 F. 2d 727.

No. 82-6944. ENGEL *v.* NEW YORK STATE HUMAN RIGHTS APPEAL BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1434.

No. 82-6947. BOTHMAN *v.* ENGLE. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1499.

No. 82-6948. ESTRADA-RAMIREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 707 F. 2d 519.

No. 82-6949. VICCARONE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 460.

No. 82-6951. O'CONNELL *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 91 App. Div. 2d 1209, 458 N. Y. S. 2d 967.

No. 82-6952. SANDERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1511.

No. 82-6953. SPARKS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 716 F. 2d 906.

No. 82-6954. BILLINGS *v.* PANNUCCI, CIRCUIT JUDGE, MUSKEGON COUNTY, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1499.

No. 82-6955. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 711 F. 2d 1060.

No. 82-6958. RANDALL *v.* BAILEY ET AL. C. A. 9th Cir. Certiorari denied.

No. 82-6959. WALKER *v.* MAGGIO, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 703 F. 2d 555.

No. 82-6961. MCMINN *v.* MARSHALL; and MCMINN *v.* SEITER. Sup. Ct. Ohio. Certiorari denied.

No. 82-6962. BATCH *v.* BETTIS, JUDGE, ET AL. C. A. 6th Cir. Certiorari denied.

No. 82-6963. HICKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 700 F. 2d 181.

No. 82-6964. STARLING *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 707 F. 2d 513.

No. 82-6965. MUHAMMAD *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 709 F. 2d 1493.

No. 82-6966. WONG *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 703 F. 2d 65.

No. 82-6967. THOMAS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 82-6968. MCLAUGHLIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 701 F. 2d 169.

No. 82-6970. VAN BENS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 707 F. 2d 511.

No. 82-6971. HARTFORD *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 133 Ariz. 328, 651 P. 2d 856.

No. 82-6972. BARTLEY *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 93 N. J. 295, 460 A. 2d 691.

No. 82-6974. WHITESIDE *v.* PARKE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 869.

No. 82-6976. FLUELLEN *v.* JAGO. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1502.

No. 82-6977. GAMEZ-RUBIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 705 F. 2d 449.

No. 82-6980. LEWIS ET AL. *v.* DAVIS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 701 F. 2d 165.

No. 82-6984. BELL *v.* THIGPEN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 692 F. 2d 999.

No. 82-6985. DEANDREA *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 416 So. 2d 522.

No. 82-6987. BAIRD *v.* WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES. Ct. App. Wash. Certiorari denied. Reported below: 33 Wash. App. 1059.

No. 82-6988. LOVE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 82-6993. MILLER *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 82-6994. FAULKNER *v.* KELLY, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 82-6995. REID *v.* DEPARTMENT OF HEALTH AND MENTAL HYGIENE. Ct. Sp. App. Md. Certiorari denied. Reported below: 53 Md. App. 756.

No. 82-6996. MCCRARY-EL *v.* WYRICK. C. A. 8th Cir. Certiorari denied.

No. 82-6998. LASKI *v.* LASKI. Sup. Ct. N. J. Certiorari denied. Reported below: 93 N. J. 318, 460 A. 2d 708.

No. 82-7000. HARBIN *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 165 Ga. App. 631, 302 S. E. 2d 386.

No. 82-7001. JILES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 709 F. 2d 1496.

No. 82-7007. Pawlyshyn *v.* Smith, Superintendent, Attica Correctional Facility. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 1440.

No. 82-7008. Harris et al. *v.* Kastama et al. Sup. Ct. Wash. Certiorari denied. Reported below: 98 Wash. 2d 765, 657 P. 2d 1388.

No. 82-7009. Soto-Duran *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 709 F. 2d 1519.

No. 82-7010. Hernandez *v.* Estelle, Director, Texas Department of Corrections. C. A. 5th Cir. Certiorari denied. Reported below: 703 F. 2d 555.

No. 82-7011. Daniels *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied.

No. 82-7012. Sanchez *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 82-7016. Ryan *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 711 F. 2d 1060.

No. 82-7017. Forbes et al. *v.* Municipal Court of Los Angeles Judicial District et al. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 82-7018. Murph *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 707 F. 2d 895.

No. 82-7020. Baker *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 711 F. 2d 1059.

No. 82-7021. McKibbins *v.* Illinois. Sup. Ct. Ill. Certiorari denied. Reported below: 96 Ill. 2d 176, 449 N. E. 2d 821.

No. 82-7022. Mulville *v.* Iowa. Sup. Ct. Iowa. Certiorari denied. Reported below: 335 N. W. 2d 903.

No. 82-7023. Tokar et al. *v.* Hearne et al. C. A. 5th Cir. Certiorari denied. Reported below: 699 F. 2d 753.

No. 82-7024. Tinnen *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 703 F. 2d 578.

No. 82-7025. Privett *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 706 F. 2d 317.

No. 82–7026. Dobbs et ux. *v.* Cobb E.N.T. Associates, P.C., et al. Sup. Ct. Ga. Certiorari denied.

No. 82–7028. Franklin *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 704 F. 2d 1183.

No. 82–7031. Roberts *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 722 F. 2d 729.

No. 82–7032. Newtop *v.* Lee. Super. Ct. Cal., City and County of San Francisco. Certiorari denied.

No. 82–7033. Panter et al. *v.* Miller et al. Ct. App. Ga. Certiorari denied. Reported below: 165 Ga. App. 266, 299 S. E. 2d 185.

No. 82–7034. Edwards *v.* Parke, Warden, Kentucky State Penitentiary. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1501.

No. 82–7035. Caran *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 722 F. 2d 729.

No. 83–2. Leventhal *v.* Reiser et al. C. A. 1st Cir. Certiorari denied.

No. 83–5. Polskie Linie Lotnicze (LOT Polish Airlines) *v.* Robles et al. C. A. 2d Cir. Certiorari denied. Reported below: 705 F. 2d 85.

No. 83–7. King et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 703 F. 2d 119.

No. 83–8. Lee *v.* National Can Corp. C. A. 7th Cir. Certiorari denied. Reported below: 699 F. 2d 932.

No. 83–10. Pressroom Unions-Printers League Income Security Fund *v.* Continental Assurance Co. et al. C. A. 2d Cir. Certiorari denied. Reported below: 700 F. 2d 889.

No. 83–11. Jimena *v.* Board of Review of the Utah Industrial Commission et al. Sup. Ct. Utah. Certiorari denied.

No. 83–12. Bergen *v.* Edenfield, Judge, United States District Court for the Southern District of Georgia. C. A. 11th Cir. Certiorari denied. Reported below: 701 F. 2d 906.

No. 83-13. FLEURY ET AL. *v.* HARPER & ROW, PUBLISHERS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 1022.

No. 83-14. STATE BOARD OF EQUALIZATION *v.* TRAILER TRAIN CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 697 F. 2d 860.

No. 83-15. SALSBURY, AS PARENT, NATURAL GUARDIAN, AND ADMINISTRATOR OF THE ESTATE OF SALSBURY *v.* SAINT VINCENT HOSPITAL ET AL. C. A. 3d Cir. Certiorari denied.

No. 83-16. COPENHAVER *v.* HARRIS ENTERPRISES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 1229.

No. 83-17. RAJA ET VIR *v.* MICHAEL REESE HOSPITAL ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 95 Ill. 2d 193, 447 N. E. 2d 385.

No. 83-20. POWELL *v.* NIGRO ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 229 U. S. App. D. C. 142, 711 F. 2d 420.

No. 83-23. IREDELL MEMORIAL HOSPITAL, INC. *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 699 F. 2d 196.

No. 83-25. COODY ET AL. *v.* LOUISIANA. Ct. App. La., 2d Cir. Certiorari denied.

No. 83-26. LAVENTHALL *v.* GENERAL DYNAMICS CORP. C. A. 8th Cir. Certiorari denied. Reported below: 704 F. 2d 407.

No. 83-31. FAIR GROUNDS CORP. *v.* PARI-MUTUEL CLERKS UNION OF LOUISIANA, LOCAL 328, AFFILIATED WITH THE SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO. C. A. 5th Cir. Certiorari denied. Reported below: 703 F. 2d 913.

No. 83-33. SCHWANECKE ET AL. *v.* HARRIS COUNTY HOSPITAL DISTRICT ET AL. Ct. App. Tex., 10th Sup. Jud. Dist. Certiorari denied.

No. 83-34. STOUFFER CORP. *v.* PRUDENTIAL INSURANCE COMPANY OF AMERICA ET AL. C. A. 6th Cir. Certiorari denied.

No. 83-36. VANN ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1510.

No. 83-37. DAMICO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 714 F. 2d 125.

No. 83-38. SANTA CLARA VALLEY WATER DISTRICT ET AL. *v.* MARTINO ET UX. C. A. 9th Cir. Certiorari denied. Reported below: 703 F. 2d 1141.

No. 83-39. T.N.T. MARINE SERVICE, INC. *v.* WEAVER SHIPYARDS & DRYDOCKS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 702 F. 2d 585.

No. 83-40. HEDLEY ET AL. *v.* TRANS WORLD AIRLINES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 709 F. 2d 1516.

No. 83-41. LOCAL UNION NO. 141, SHEET METAL WORKERS INTERNATIONAL ASSN., ET AL. *v.* SANDMAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 865.

No. 83-42. HAGERSTOWN KITCHENS, INC. *v.* BOARD OF COUNTY COMMISSIONERS OF WASHINGTON COUNTY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 707 F. 2d 506.

No. 83-44. SOLON BAPTIST TEMPLE, INC. *v.* CITY OF SOLON ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Reported below: 8 Ohio App. 3d 347, 457 N. E. 2d 858.

No. 83-45. CARNICLE *v.* FOX, SHERIFF OF MORRIS COUNTY. C. A. 3d Cir. Certiorari denied. Reported below: 714 F. 2d 121.

No. 83-46. KIZZIER CHEVROLET CO., INC., OF SCOTTSBLUFF, NEBRASKA, ET AL. *v.* GENERAL MOTORS CORP., OLDSMOBILE DIVISION. C. A. 8th Cir. Certiorari denied. Reported below: 705 F. 2d 322.

No. 83-47. DICARLO *v.* A & W PRODUCTS CO., INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 714 F. 2d 121.

No. 83-49. FRANK *v.* DAVIS, COMMISSIONER OF PARKS AND RECREATION OF NEW YORK CITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 718 F. 2d 1085.

No. 83-51. BONDED ELEVATOR, INC., ET AL. *v.* FIRST AMERICAN NATIONAL BANK OF NASHVILLE. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1502.

No. 83-52. TAYLOR ET UX. *v.* LAWSON MILK CO. ET AL. Ct. App. Ohio, Franklin County. Certiorari denied. Reported below: 8 Ohio App. 3d 161, 456 N. E. 2d 558.

No. 83-53. CHESAPEAKE & OHIO RAILWAY CO. *v.* SCHAAF. Ct. App. Mich. Certiorari denied. Reported below: 113 Mich. App. 544, 317 N. W. 2d 679.

No. 83-57. DAVIS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 311 Pa. Super. 585, 458 A. 2d 258.

No. 83-58. PHILADELPHIA LIFT TRUCK CORP. *v.* TAYLOR MACHINE WORKS, INC. C. A. 3d Cir. Certiorari denied. Reported below: 709 F. 2d 1495.

No. 83-60. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1511.

No. 83-62. JENKINS *v.* JENKINS. C. A. 10th Cir. Certiorari denied.

No. 83-68. WHITE *v.* WHITE. C. A. 9th Cir. Certiorari denied. Reported below: 707 F. 2d 521.

No. 83-69. UPJOHN CO. *v.* MAULDIN. C. A. 5th Cir. Certiorari denied. Reported below: 697 F. 2d 644.

No. 83-72. BRUNTY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 701 F. 2d 1375.

No. 83-74. TABONE *v.* POSNER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 700 F. 2d 1243.

No. 83-76. CHILDREN *v.* BURTON ET AL. Sup. Ct. Iowa. Certiorari denied. Reported below: 331 N. W. 2d 673.

No. 83-77. ATLANTIC PURCHASERS, INC., ET AL. *v.* AIRCRAFT SALES, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 705 F. 2d 712.

No. 83-80. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 706 F. 2d 314.

No. 83-81. MAIORANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 714 F. 2d 125.

No. 83-82. GOLDBERG *v.* WOODCREST NURSING HOME ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 706 F. 2d 70.

No. 83-83. ALVAREZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 649 S. W. 2d 613.

No. 83-85. EASTERN FOODS, INC. *v.* R. C. MCENTIRE & CO. C. A. 4th Cir. Certiorari denied. Reported below: 702 F. 2d 471.

No. 83-88. MCDONNELL DOUGLAS CORP. *v.* NORTHROP CORP. C. A. 9th Cir. Certiorari denied. Reported below: 705 F. 2d 1030.

No. 83-92. LARSEN *v.* KIRKHAM ET AL. C. A. 10th Cir. Certiorari denied.

No. 83-93. GEE *v.* FUNG ET AL. C. A. 9th Cir. Certiorari denied.

No. 83-94. S.S. NANCY LYKES ET AL. *v.* GENERAL ELECTRIC CO., INTERNATIONAL SALES DIVISION. C. A. 2d Cir. Certiorari denied. Reported below: 706 F. 2d 80.

No. 83-98. HUMPHREY *v.* CITY OF SHREVEPORT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 705 F. 2d 448.

No. 83-99. VARKONYI, INDIVIDUALLY, AND DBA METAL RECYCLING CO. *v.* DONOVAN, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. Reported below: 703 F. 2d 555.

No. 83-100. CIANCAGLINI ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 709 F. 2d 214.

No. 83-102. GRENADA BANK, DBA COAHOMA BANK *v.* WILLEY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 176.

No. 83-104. TANGO *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 83-105. WAGMAN *v.* LEE. Ct. App. D. C. Certiorari denied. Reported below: 457 A. 2d 401.

No. 83-110. WILLIAMS ET AL. *v.* LADNER ET AL. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 434 A. 2d 37.

No. 83-111. DROUILLARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 711 F. 2d 1060.

No. 83-112. HOLWAY *v.* THORNTON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 705 F. 2d 443.

No. 83-115. BRIECE *v.* BRIECE ET UX. C. A. 8th Cir. Certiorari denied. Reported below: 703 F. 2d 1045.

No. 83-117. KANSAS CITY SOUTHERN RAILWAY CO. *v.* FAULKENBERRY. Sup. Ct. Okla. Certiorari denied. Reported below: 661 P. 2d 510.

No. 83-121. HECK *v.* HECK. Sup. Ct. App. W. Va. Certiorari denied. Reported below: —— W. Va. ——, 301 S. E. 2d 158.

No. 83-126. MALACHOWSKI *v.* SILVERBERG, MARVIN & SWAIM, P.C., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 1444.

No. 83-130. MEADOWS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 711 F. 2d 1060.

No. 83-133. WOO CHIN TONG *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 83-135. GIVENS *v.* CASTILLO ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 704 F. 2d 181.

No. 83-142. DIXON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 716 F. 2d 892.

No. 83-143. SULLIVAN, DBA COLUMBIA POLY PACK CO. *v.* TOWN OF VERNON, CONNECTICUT. Super. Ct. Conn., Tolland Jud. Dist. Certiorari denied.

No. 83-145. AMERICAN FAMILY LIFE ASSURANCE CO. *v.* HIAM, COMMISSIONER OF INSURANCE. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 388 Mass. 468, 446 N. E. 2d 1061.

No. 83-146. S & S MACHINERY CO. *v.* MASINEXPORTIMPORT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 706 F. 2d 411.

No. 83–148. JOHNSON *v.* DISTRICT SCHOOL BOARD OF HERNANDO COUNTY, FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 701 F. 2d 188.

No. 83–149. ROBINSON *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 99 N. M. 674, 662 P. 2d 1341.

No. 83–150. O'CONNOR, DIRECTOR OF INSURANCE OF ILLINOIS *v.* ORGAN & CO., INC. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 428 So. 2d 1187.

No. 83–155. VEENKANT *v.* GURN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1512.

No. 83–157. VEENKANT *v.* WESLER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1512.

No. 83–158. MEMBERS OF THE JAMESTOWN SCHOOL COMMITTEE ET AL. *v.* SCHMIDT, COMMISSIONER OF EDUCATION OF RHODE ISLAND, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 699 F. 2d 1.

No. 83–160. KRALL *v.* BETHEL PARK SCHOOL DISTRICT. Pa. Commw. Ct. Certiorari denied. Reported below: 67 Pa. Commw. 143, 445 A. 2d 1377.

No. 83–161. JOHNSON *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 8 Ark. App. xvi.

No. 83–164. AMERICAN MOTORISTS INSURANCE CO. *v.* ZAITCHICK ET UX. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1441.

No. 83–168. CONSTRUCTION & GENERAL LABORERS UNION LOCAL 304 ET AL. *v.* PAUL E. IACONO STRUCTURAL ENGINEER, INC. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 435.

No. 83–170. SPAULDING *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 434 So. 2d 419.

No. 83–182. SMITTY BAKER COAL CO., INC., ET AL. *v.* FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 226 U. S. App. D. C. 240, 701 F. 2d 976.

No. 83-183. LTV Federal Credit Union *v.* UMIC Government Securities, Inc., et al. C. A. 5th Cir. Certiorari denied. Reported below: 704 F. 2d 199.

No. 83-187. Tsanos et al. *v.* Division of Administration, Florida Department of Transportation. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 429 So. 2d 17.

No. 83-191. Kubiak *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 704 F. 2d 1545.

No. 83-192. Bouclin *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 703 F. 2d 577.

No. 83-194. Burton *v.* Pacific Far East Lines, Inc. C. A. 9th Cir. Certiorari denied. Reported below: 703 F. 2d 574.

No. 83-197. Kocian *v.* Getty Refining & Marketing Co. C. A. 3d Cir. Certiorari denied. Reported below: 707 F. 2d 748.

No. 83-199. Kappas, Administratrix of the Estate of Kappas *v.* Chestnut Lodge, Inc., et al. C. A. 4th Cir. Certiorari denied. Reported below: 709 F. 2d 878.

No. 83-235. DMR Corp. et al. *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. Reported below: 699 F. 2d 788.

No. 83-238. Lopera-Ochoa *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 707 F. 2d 520.

No. 83-242. Padua *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 707 F. 2d 513.

No. 83-266. Fitterer *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 710 F. 2d 1328.

No. 83-275. Isaacs *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 708 F. 2d 1365.

No. 83-287. Fernandez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 704 F. 2d 592.

No. 83-298. Figueroa *v.* United States; and
No. 83-5298. Canel *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 708 F. 2d 894.

No. 83-5002. DILLON *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 433 So. 2d 533.

No. 83-5003. THOMPKINS *v.* MARSHALL. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1509.

No. 83-5004. NEWMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 709 F. 2d 1519.

No. 83-5006. LAING *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 703 F. 2d 581.

No. 83-5007. TAYLOR *v.* QUICK. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 1441.

No. 83-5008. ROBERTS *v.* MOORE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 707 F. 2d 509.

No. 83-5009. RONDON-LIMONTA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 706 F. 2d 316.

No. 83-5010. GELB *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 700 F. 2d 875.

No. 83-5011. FOBES *v.* SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 83-5012. FRANEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 706 F. 2d 313.

No. 83-5013. CHILDRESS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 4 Ohio St. 3d 217, 448 N. E. 2d 155.

No. 83-5015. WATERHOUSE *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 62 Ore. App. 12, 659 P. 2d 1013.

No. 83-5018. ARAMBULA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 709 F. 2d 1518.

No. 83-5020. CAVANAUGH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 707 F. 2d 511.

No. 83-5024. TRUSSELL *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 699 F. 2d 256.

No. 83-5031. LIPSCOMB *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1504.

No. 83-5033. HUNTER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 83-5034. RANKIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 711 F. 2d 1060.

No. 83-5036. HOOVER *v.* LEE, SUPERINTENDENT, BRONX HOUSE OF DETENTION. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 1440.

No. 83-5038. BRUCE *v.* UPPER EAST TENNESSEE HUMAN DEVELOPMENT AGENCY, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1499.

No. 83-5041. DOCK *v.* SMITH ET AL. C. A. 10th Cir. Certiorari denied.

No. 83-5042. CARLSEN *v.* MORRIS, WARDEN, UTAH STATE PRISON. C. A. 10th Cir. Certiorari denied.

No. 83-5044. FLYGARE *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 32 Wash. App. 1019.

No. 83-5045. DAVENPORT *v.* ZIMMERMAN ET AL. C. A. 3d Cir. Certiorari denied.

No. 83-5046. GASTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 705 F. 2d 449.

No. 83-5047. RICHARDSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 701 F. 2d 946.

No. 83-5048. PEPPER *v.* KAZUBOWSKI, COUNTY CLERK FOR THE COUNTY OF SANTA CLARA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 83-5050. KINNELL *v.* STEPHAN, ATTORNEY GENERAL OF KANSAS. C. A. 10th Cir. Certiorari denied.

No. 83-5052. COLEMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 707 F. 2d 374.

No. 83-5055. LEVY *v.* DEPARTMENT OF REHABILITATIVE SERVICES OF VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 711 F. 2d 1050.

No. 83-5056. CHIAGO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 699 F. 2d 1012.

No. 83-5057. ALSTON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 92 App. Div. 2d 752, 460 N. Y. S. 2d 970.

No. 83-5059. WOOD *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 83-5065. SAINTIL ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 705 F. 2d 415.

No. 83-5066. RYAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 711 F. 2d 1067.

No. 83-5068. COXWELL *v.* FORTNER, SUPERINTENDENT, AVON PARK CORRECTIONAL INSTITUTION, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 707 F. 2d 522.

No. 83-5069. OAKIE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 709 F. 2d 506.

No. 83-5070. LEVY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 83-5071. PHIFER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 711 F. 2d 1060.

No. 83-5073. GONZALES *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 99 N. M. 734, 663 P. 2d 710.

No. 83-5074. BELL *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 83-5075. HARRIS *v.* LASTER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 707 F. 2d 517.

No. 83-5076. JOHNSON *v.* LOUISIANA ET AL. C. A. 10th Cir. Certiorari denied.

No. 83-5078. MOREJON-ORTEGA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 708 F. 2d 857.

No. 83-5081. DAVIS *v.* MCKENZIE, WAKE COUNTY REGISTER OF DEEDS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 705 F. 2d 442.

No. 83-5082. TUTT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 704 F. 2d 1567.

No. 83-5084. MARQUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 711 F. 2d 1066.

No. 83-5085. PIATKOWSKA *v.* VONS FOODMARKETS. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 83-5086. CASTANEDA-REYES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 703 F. 2d 522.

No. 83-5089. KAPPER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 5 Ohio St. 3d 36, 448 N. E. 2d 823.

No. 83-5090. CAGNINA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 697 F. 2d 915.

No. 83-5091. JONES *v.* MISSISSIPPI RIVER GRAIN ELEVATOR CO. C. A. 5th Cir. Certiorari denied. Reported below: 703 F. 2d 108.

No. 83-5093. CHESSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 711 F. 2d 1051.

No. 83-5096. BUSTAMANTE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 706 F. 2d 13.

No. 83-5097. NATION *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 701 F. 2d 31.

No. 83-5098. SCOTT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 701 F. 2d 1340.

No. 83-5099. BLACK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 711 F. 2d 1051.

No. 83-5101. LANDES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 704 F. 2d 152.

No. 83-5103. VALENZUELA *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 231 Ct. Cl. 907.

No. 83-5104. TORPY *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 706 F. 2d 319.

No. 83-5107. BROWN *v.* LUTHERAN HOSPITAL SOCIETY OF SOUTHERN CALIFORNIA, DBA SANTA MONICA HOSPITAL MEDICAL CENTER. C. A. 9th Cir. Certiorari denied.

No. 83-5110. LIPSCOMB *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 718 F. 2d 1106.

No. 83-5112. SOMMER *v.* DIXON ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 709 F. 2d 173.

No. 83-5113. WATTS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 679 F. 2d 903.

No. 83-5114. STEVENSON *v.* CONRAD. C. A. 8th Cir. Certiorari denied.

No. 83-5115. TYLER *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 705 F. 2d 448.

No. 83-5118. DODD *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 664 P. 2d 1047.

No. 83-5119. ROSARIO *v.* UNITED STATES; and
No. 83-5219. SHARPE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 714 F. 2d 146.

No. 83-5120. WOODSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 709 F. 2d 1519.

No. 83-5121. SAMUEL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 705 F. 2d 463.

No. 83-5125. HELTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 709 F. 2d 715.

No. 83-5126. LEWIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 703 F. 2d 119.

No. 83-5128. LEONARD *v.* ZIMMERMAN ET AL. C. A. 3d Cir. Certiorari denied.

No. 83-5129. SALMAN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied.

No. 83-5130. CROOKER *v.* INTERNAL REVENUE SERVICE. C. A. 1st Cir. Certiorari denied.

No. 83-5131. BURTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 711 F. 2d 1060.

No. 83-5132. LOZANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 709 F. 2d 1519.

No. 83-5133. DOYLE *v.* DELAWARE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 707 F. 2d 1400.

No. 83-5134. KLAYER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 707 F. 2d 892.

No. 83-5135. MENICHINO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1510.

No. 83-5136. MCMURTREY *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 136 Ariz. 93, 664 P. 2d 637.

No. 83-5137. SMITH *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 83-5138. MENKES *v.* CITY OF NEW YORK ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 91 App. Div. 2d 654, 457 N. Y. S. 2d 99.

No. 83-5139. RUNTE *v.* HUNTER, U. S. DISTRICT JUDGE. C. A. 5th Cir. Certiorari denied.

No. 83-5142. FISHER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 83-5143. HOLLAND *v.* GUEST QUARTERS. C. A. 4th Cir. Certiorari denied. Reported below: 707 F. 2d 507.

No. 83-5144. AARON *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied.

No. 83-5150. DEAL *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 83-5152. WILLIAMS ET AL. *v.* AIR TRANSPORT UNION LOCAL NO. 504 ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 1442.

No. 83-5155. GORDON *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 83-5157. EDWARDS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 709 F. 2d 1496.

No. 83-5158. PIERCE *v.* VOLKSWAGEN OF AMERICA, INC. Sup. Ct. Ind. Certiorari denied.

No. 83-5159. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 707 F. 2d 511.

No. 83-5161. MARTIN *v.* MEACHUM, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied.

No. 83-5164. ROBINSON *v.* BOYD. C. A. 4th Cir. Certiorari denied. Reported below: 707 F. 2d 510.

No. 83-5166. MOORE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 706 F. 2d 538.

No. 83-5167. HALL *v.* ALABAMA. C. A. 11th Cir. Certiorari denied. Reported below: 700 F. 2d 1333.

No. 83-5172. MYERS *v.* SPALDING, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 709 F. 2d 1517.

No. 83-5174. WEDDELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 716 F. 2d 908.

No. 83-5175. ZERMAN *v.* JACOBS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 1443.

No. 83-5180. JONES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 707 F. 2d 1169.

No. 83-5182. FLEMING *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 665 P. 2d 1225.

No. 83-5185. POPPOS *v.* MCCAFFREY. Cir. Ct. Montgomery County, Md. Certiorari denied.

No. 83-5186. SMITH *v.* CLARK, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI. C. A. 8th Cir. Certiorari denied.

No. 83-5187. NEIL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 83-5190. ESTLACK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 711 F. 2d 1066.

No. 83–5191. INGRAHAM *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 461 A. 2d 1054.

No. 83–5194. EVANS *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDERS REHABILITATIVE SERVICE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 711 F. 2d 1063.

No. 83–5196. MCNAIR *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 113 Ill. App. 3d 8, 446 N. E. 2d 577.

No. 83–5197. SELTZER *v.* PEACH ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 716 F. 2d 906.

No. 83–5200. WHAM *v.* UNITED STATES POSTAL SERVICE. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 107.

No. 83–5201. GEIGER *v.* LEHMAN, SECRETARY OF THE NAVY. C. A. 4th Cir. Certiorari denied. Reported below: 707 F. 2d 506.

No. 83–5202. WHITE *v.* UNITED PARCEL SERVICE, INC. C. A. 11th Cir. Certiorari denied.

No. 83–5203. SAMMONS *v.* ROTROFF. Ct. App. Tenn. Certiorari denied. Reported below: 653 S. W. 2d 740.

No. 83–5205. BISHOP *v.* GANDY, DISTRICT MANAGER, SOCIAL SECURITY ADMINISTRATION. Sup. Ct. Ala. Certiorari denied. Reported below: 436 So. 2d 28.

No. 83–5207. MULLIGAN *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 83–5208. CINELLI *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 389 Mass. 197, 449 N. E. 2d 1207.

No. 83–5210. EDWARDS *v.* DAVIS ET AL. C. A. 2d Cir. Certiorari denied.

No. 83–5211. NEACE *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 83-5217. LOPEZ ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 709 F. 2d 742.

No. 83-5218. WARE *v.* OWENS-ILLINOIS, INC. C. A. 11th Cir. Certiorari denied. Reported below: 703 F. 2d 581.

No. 83-5220. SIVRIGHT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 714 F. 2d 143.

No. 83-5223. ALLEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 83-5225. CLARK *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 83-5228. ALEXANDER *v.* ZEANAH ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 707 F. 2d 522.

No. 83-5230. MATTHEWS *v.* UNITED STATES; and
No. 83-5232. HOFFMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 711 F. 2d 1066.

No. 83-5233. JAY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 716 F. 2d 893.

No. 83-5234. TILLMAN *v.* VAN NESS ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 83-5235. YEAGER *v.* WILKINSON, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 707 F. 2d 943.

No. 83-5236. ZERILLI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 706 F. 2d 877.

No. 83-5239. PRICE *v.* MAGGIO, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 711 F. 2d 1053.

No. 83-5242. MCQUEEN *v.* BARBER ET AL. C. A. 11th Cir. Certiorari denied.

No. 83-5246. WARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 701 F. 2d 946.

No. 83-5247. FARMER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 83-5248. WHEELING *v.* COMMISSIONER OF INTERNAL REVENUE SERVICE. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1512.

No. 83-5250. WHITEMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 716 F. 2d 893.

No. 83-5254. WRIGHT *v.* NEW YORK LIFE INSURANCE CO. C. A. 7th Cir. Certiorari denied.

No. 83-5255. PETTEE *v.* PURVIS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 714 F. 2d 132.

No. 83-5256. LAGNAS *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 229 Ct. Cl. 584.

No. 83-5257. WARNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 705 F. 2d 463.

No. 83-5258. McCORD *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied.

No. 83-5261. HOBSON *v.* U. S. PAROLE COMMISSION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 714 F. 2d 146.

No. 83-5263. DRINKWINE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 714 F. 2d 143.

No. 83-5264. SANTIAGO-GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 711 F. 2d 1067.

No. 83-5269. OSTRER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 1441.

No. 83-5270. WARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 707 F. 2d 520.

No. 83-5272. THERIAULT *v.* FEDERAL BUREAU OF PRISONS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 714 F. 2d 145.

No. 83-5276. MOORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 710 F. 2d 157.

No. 83-5297. HOLDEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 714 F. 2d 134.

No. 83-5305. HUMPHEREY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 83-5307. BEEMBLOSSOM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 714 F. 2d 147.

No. 82-1653. NEWMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE POWELL would grant certiorari. Reported below: 722 F. 2d 729.

No. 82-1682. JABARA *v.* WEBSTER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 691 F. 2d 272.

No. 82-1723. PYRAMID LAKE PAIUTE TRIBE OF INDIANS *v.* TRUCKEE-CARSON IRRIGATION DISTRICT ET AL. C. A. 9th Cir. Motion to intervene in order to file a petition for writ of certiorari granted. Certiorari denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN would grant certiorari. Reported below: 697 F. 2d 851.

No. 82-1793. ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD ET AL. *v.* LEWIS-WESTCO CO. Ct. App. Cal., 1st App. Dist. Motion of Wine & Spirits Wholesalers of California for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 136 Cal. App. 3d 829, 186 Cal. Rptr. 552.

No. 82-1822. QUILICI *v.* VILLAGE OF MORTON GROVE ET AL.;

No. 82-1930. REICHERT ET AL. *v.* VILLAGE OF MORTON GROVE ET AL.; and

No. 82-1934. STENGL ET AL. *v.* VILLAGE OF MORTON GROVE ET AL. C. A. 7th Cir. Motion of Handgun Control, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 695 F. 2d 261.

No. 82-1829. CALLAHAN *v.* YOUNG. C. A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 700 F. 2d 32.

No. 82-1896. TEXAS *v.* GARZA. Ct. Crim. App. Tex. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 658 S. W. 2d 152.

No. 82–1986. WASHINGTON COUNTY HOSPITAL ASSN., INC. *v.* MORRISON, ADMINISTRATRIX OF THE ESTATE OF MORRISON. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 700 F. 2d 678.

No. 82–2156. HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY *v.* SILVERSTEIN. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 706 F. 2d 361.

No. 83–175. CATHOLIC HOME BUREAU *v.* DOE. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 709 F. 2d 782.

No. 82–1836. KEENE CORP. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition. Reported below: 700 F. 2d 836.

No. 82–1890. CINCINNATI CITY SCHOOL DISTRICT BOARD OF EDUCATION ET AL. *v.* RONCKER, ON BEHALF OF RONCKER. C. A. 6th Cir. Motion of National School Boards Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 700 F. 2d 1058.

No. 82–2034. ASTILLEROS ESPANOLES, S.A. *v.* STANDARD OIL CO. (INDIANA) ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 699 F. 2d 909.

No. 82–2051. GIDDINGS & LEWIS MACHINE TOOL CO. *v.* POLLAK, JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Motion of respondents John and Patricia Trapanese for damages denied. Certiorari denied.

No. 82–2053. SINGLETON *v.* VIRGINIA ELECTRIC & POWER CO. C. A. 4th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 701 F. 2d 168.

No. 82-2105. McDOUGALL *v.* NORTH CAROLINA. Sup. Ct. N. C.;

No. 82-6697. SIMMONS *v.* ARKANSAS. Sup. Ct. Ark.;

No. 82-6733. MAGILL *v.* FLORIDA. Sup. Ct. Fla.;

No. 82-6741. HAYES *v.* ARKANSAS. Sup. Ct. Ark.;

No. 82-6771. FLAMER *v.* DELAWARE. Sup. Ct. Del.;

No. 82-6852. WILSON *v.* GEORGIA. Sup. Ct. Ga.;

No. 82-6865. MUHAMMAD *v.* FLORIDA. Sup. Ct. Fla.;

No. 82-6870. JEFFERS *v.* ARIZONA. Sup. Ct. Ariz.;

No. 82-6876. KUBAT *v.* ILLINOIS. Sup. Ct. Ill.;

No. 82-6881. FREE *v.* ILLINOIS. Sup. Ct. Ill.;

No. 82-6915. BASS *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir.;

No. 82-6916. BUSH *v.* ALABAMA. Sup. Ct. Ala.;

No. 82-6922. DE LA ROSA *v.* TEXAS. Ct. Crim. App. Tex.;

No. 82-6923. FORD *v.* STRICKLAND, WARDEN, FLORIDA STATE PRISON, ET AL. C. A. 11th Cir.;

No. 82-6933. PRUETT *v.* MISSISSIPPI. Sup. Ct. Miss.;

No. 82-6937. PORTER *v.* FLORIDA. Sup. Ct. Fla.;

No. 82-6982. NARCISSE *v.* LOUISIANA. Sup. Ct. La.;

No. 82-6990. PETERSON *v.* VIRGINIA. Sup. Ct. Va.;

No. 83-5051. WILLIAMS *v.* NORTH CAROLINA. Sup. Ct. N. C.;

No. 83-5095. CONNER *v.* GEORGIA. Sup. Ct. Ga.;

No. 83-5145. ARMSTRONG *v.* FLORIDA. Sup. Ct. Fla.;

No. 83-5183. DAVIS *v.* OKLAHOMA. Ct. Crim. App. Okla.; and

No. 83-5227. ADAMSON *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: No. 82-2105, 308 N. C. 1, 301 S. E. 2d 308; No. 82-6697, 278 Ark. 305, 645 S. W. 2d 680; No. 82-6733, 428 So. 2d 649; No. 82-6741, 278 Ark. 211, 645 S. W. 2d 662; No. 82-6771, 490 A. 2d 104; No. 82-6852, 250 Ga. 630, 300 S. E. 2d 640; No. 82-6865, 426 So. 2d 533; No. 82-6870, 135 Ariz. 404, 661 P. 2d 1105; No. 82-6876, 94 Ill. 2d 437, 447 N. E. 2d 247; No. 82-6881, 94 Ill. 2d 378, 447 N. E. 2d 218; No. 82-6915, 696 F. 2d 1154 and 705 F. 2d 121; No. 82-6916, 431 So. 2d 563; No. 82-6922, 658 S. W. 2d 162; No. 82-6923, 696 F. 2d 804; No. 82-6933, 431 So. 2d 1101; No. 82-6937, 429 So. 2d 293; No. 82-6982, 426 So. 2d 118; No. 82-6990, 225 Va. 289, 302 S. E. 2d 520; No. 83-5051, 308 N. C. 47, 301 S. E. 2d 335; No. 83–5095, 251 Ga. 113, 303 S. E. 2d 266; No. 83–5145, 429 So. 2d 287; No. 83–5183, 665 P. 2d 1186; No. 83–5227, 136 Ariz. 250, 665 P. 2d 972.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 82–2058. NELSON, DBA NELSON HOUSE *v.* TUSCARORA INTERMEDIATE UNIT NO. 11. Sup. Ct. Pa. Motion of Pennsylvania for leave to intervene as a party respondent granted. Certiorari denied. Reported below: 500 Pa. 458, 457 A. 2d 1260.

No. 82–2075. ARIZONA *v.* YOUNG. Ct. App. Ariz. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this motion and this petition. Reported below: 135 Ariz. 437, 661 P. 2d 1138.

No. 82–2077. OLSEN ET AL. *v.* PROGRESSIVE MUSIC SUPPLY, INC., ET AL. C. A. 10th Cir. Motion of petitioners to consolidate case with No. 83–188, *Olsen* v. *CBS Musical Instruments*, denied. Motion of respondent Peavey Electronics Corp. for damages denied. Certiorari denied. Reported below: 703 F. 2d 432.

No. 82–2129. HAIDER, AS ADMINISTRATOR OF THE ESTATE OF HAIDER *v.* MCDONNELL DOUGLAS CORP. ET AL.; and

No. 82–2149. KAHL, SPECIAL ADMINISTRATOR OF THE ESTATE OF KAHL, ET AL. *v.* MCDONNELL DOUGLAS CORP. ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of these petitions. Reported below: 701 F. 2d 1189.

No. 82–2134. ALSIDE, INC., ET AL. *v.* WEINER, UNITED STATES DISTRICT JUDGE. C. A. 8th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 705 F. 2d 980.

No. 82–2146. MASHPEE TRIBE *v.* NEW SEABURY CORP. ET AL. C. A. 1st Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied.

No. 82–6558. BAILEY *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 490 A. 2d 158.

No. 82–6591. WILSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 690 F. 2d 1267.

No. 82–6642. NOVACK *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 111 Wis. 2d 701, 332 N. W. 2d 312.

No. 82–6649. NUNLEY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 660 P. 2d 1052.

No. 82–6821. MCCLINNAHAN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 454 A. 2d 1340.

No. 82–6981. TEAGUE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 108 Ill. App. 3d 891, 439 N. E. 2d 1066.

No. 82–6775. GILLIARD *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 428 So. 2d 576.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the judgment of the Supreme Court of Mississippi insofar as it left undisturbed the death sentence imposed in this case. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). However, even if I believed that the death penalty could constitutionally be imposed under certain circumstances, I would grant certiorari and vacate the death sentence imposed here.

For the third time this year, this Court has refused to review a case in which an all-white jury has sentenced a Negro defendant to death after the prosecution used peremptory challenges to remove all Negroes from the jury. See *Miller* v. *Illinois* and *Perry*

v. *Louisiana* decided together with *McCray* v. *New York*, 461 U. S. 961 (1983) (MARSHALL, J., dissenting from denial of certiorari). The facts of each case follow a now-familiar pattern: For-cause challenges by both defense counsel and the prosecution leave an integrated jury panel. The prosecution then resorts to peremptory challenges to remove Negro members of the panel. Despite defense counsel efforts to show that the prosecution has excluded jurors on the basis of race, the trial court rules that defendant has failed to establish systematic exclusion in the manner required by this Court in *Swain* v. *Alabama*, 380 U. S. 202 (1965). The all-white jury proceeds to hear the case and sentence the Negro defendant to death.

The present case does not deviate from this pattern in any material respect. Petitioner, who is a Negro, pleaded guilty to killing Grady Chance during an armed robbery of Mr. Chance's store. In accordance with Miss. Code Ann. § 99–19–101 (Supp. 1983), a sentencing trial was then held. After for-cause challenges, the prosecution was presented a jury panel including seven Negroes. The prosecution peremptorily challenged the seven Negroes. After defense counsel exercised its peremptory challenges, the panel contained one Negro. The prosecution then used an additional peremptory challenge to remove the Negro. During a hearing held to consider petitioner's motion to quash the jury, the prosecutor took the stand, and offered reasons for three of his peremptory challenges but could not remember why he exercised the other five. Although the prosecutor had used peremptory challenges to remove all the Negro jurors and only the Negro jurors,[1] the trial court nevertheless denied petitioner's motion, and the Mississippi Supreme Court affirmed, relying on *Swain* v. *Alabama*, *supra*, and two of its own precedents that, in turn, had relied on *Swain*: *Gaines* v. *State*, 404 So. 2d 557, 560 (1981); *Coleman* v. *State*, 378 So. 2d 640, 645 (1979). An all-white jury then heard the evidence and sentenced petitioner to death.

Last Term, when the Court denied petitions for certiorari in the three cases mentioned above, I outlined my objections to the

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[1] The State contends that the prosecution did not peremptorily challenge all Negro jurors in the venire. According to the State, one Negro served as an alternate. The State, however, does not suggest that this juror ever actually served on the jury or participated in its decision to sentence petitioner to death.

Court's holding in *Swain* v. *Alabama*, and expressed my opinion that, regardless of *Swain*'s interpretation of the Equal Protection Clause, the use of peremptory challenges to exclude racial minorities violates a criminal defendant's Sixth and Fourteenth Amendment rights to be tried by a jury selected from a fair cross-section of the community. *McCray* v. *New York*, *supra*, at 966–970 (MARSHALL, J., dissenting); see *Taylor* v. *Louisiana*, 419 U. S. 522 (1975); *Duncan* v. *Louisiana*, 391 U. S. 145 (1968). I continue to hold these views and need not repeat them here.

I write today to address those of my colleagues who agree with me that the use of peremptory challenges in these cases presents important constitutional questions, but believe that this Court should postpone consideration of the issue until more State Supreme Courts and federal circuits have experimented with substantive and procedural solutions to the problem. Although I appreciate my colleagues' inclination to delay until a consensus emerges on how best to deal with misuse of peremptory challenges, I believe that for the Court to indulge that inclination on this occasion is inappropriate and ill-advised.

When Justice Brandeis originally analogized the States to laboratories in need of freedom to experiment, he was dissenting from a decision by the Court applying a now-discredited interpretation of the Due Process Clause to strike down an Oklahoma statute regulating the sale and distribution of ice. See *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 310–311 (1932). As Justice Brandeis recognized, an overly protective view of substantive due process unnecessarily stifles public welfare legislation at the state level. Since then, however, the power of the States-as-laboratories metaphor has propelled Justice Brandeis' concept far beyond the sphere of social and economic regulation. Now we find the metaphor employed to justify this Court's abstention from reaching an important issue involving the rights of individual defendants under the Federal Constitution.

When a majority of this Court suspects that such rights are being regularly abridged, the Court shrinks from its constitutional duty by awaiting developments in state or other federal courts. Because abuse of peremptory challenges appears to be most prevalent in capital cases, the need for immediate review in this Court is all the more urgent. If we postpone consideration of the issue much longer, petitioners in this and similar cases will be put to death before their constitutional rights can be vindicated. Under the circumstances, I do not understand how in good conscience we can await further developments, regardless of how helpful those developments might be to our own deliberations.

Moreover, I have serious misgivings about my colleagues' assumption that many States will, in the foreseeable future, engage in meaningful reconsideration of the discriminatory use of peremptory challenges. In the area of individual rights, state courts traditionally have looked to the federal judiciary for leadership. When decisions of this Court have expanded personal liberties in an area, state judiciaries have followed and, upon occasion, interpreted state constitutional liberties to exceed those guaranteed by the Federal Constitution. But, conversely, when this Court has announced a clearly defined, but limited, federal constitutional protection for a particular right, the State Supreme Courts have been less willing to develop more generous doctrines under their own State Constitutions.

Constitutional limitations on prosecutorial use of peremptory challenges are a clear example of how a limiting precedent in this Court inhibits doctrinal development in the States. In 1965 in *Swain* v. *Alabama*, a majority of this Court held that the prosecution is free to use peremptory challenges to remove Negroes from the jury in any given case so long as the prosecution does not remove Negroes from juries "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or victim." 380 U. S., at 223. Even though *Swain* v. *Alabama* has been roundly and regularly criticized by commentators, see sources cited in *McCray* v. *New York*, *supra*, at 964–965, n. 1 (MARSHALL, J., dissenting), in the 18 years since *Swain* was decided only two State Supreme Courts have interpreted their State Constitutions to provide criminal defendants greater protection against discriminatory use of peremptory challenges. *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978); *Commonwealth* v. *Soares*, 377 Mass. 461, 387 N. E. 2d 499, cert. denied, 444 U. S. 881 (1979).

Contrary to my colleagues' assumptions, these two recent decisions by the California and Massachusetts high courts have not inspired other State Supreme Courts to deviate from the rule of *Swain* and experiment with new remedies for peremptory challenge misuse. To my knowledge, in the five years since *Wheeler* and *Soares*, not a single State Supreme Court has imposed state constitutional limits on peremptory challenges.[2] In fact, over the same period, at least 19 jurisdictions have considered the issue and, following *Swain*, reaffirmed their view that the exclusion of Negroes by peremptory challenges is constitutional in the absence of evidence of systematic exclusion.[3]

Mississippi is typical. Since 1979, the Mississippi Supreme Court has discussed peremptory challenges in four cases.[4] In all of the cases, the court's analysis of the issue is so cursory that it is possible to reproduce its discussions unabridged. In *Coleman* v. *State*, 378 So. 2d 640 (1979), the court wrote:

> "The appellant makes general allegations that the jury, composed of 11 whites and 1 black, was not a jury of his peers. His contention seems to be that the district attorney's action, in exercising 11 of his peremptory challenges against potential black jurors, was discriminatory.
>
> "The record is devoid of any evidence of any discriminatory pattern in the selection of the special venire, the regular ve-

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[2] The only state court that has even intimated that the issue is up for reconsideration was an appellate court in New Mexico. See *State* v. *Crespin*, 94 N. M. 486, 612 P. 2d 716 (App. 1981).

[3] See *Flowers* v. *State*, 402 So. 2d 1088, 1093 (Ala. Crim. App. 1981); *Beed* v. *State*, 271 Ark. 526, 530, 609 S. W. 2d 898, 903 (1980); *Doepel* v. *United States*, 434 A. 2d 449, 457–459 (D. C.), cert. denied, 454 U. S. 1037 (1981); *Neil* v. *State*, 433 So. 2d 51 (Fla. App. 1983) (question certified to Florida Supreme Court); *Blackwell* v. *State*, 248 Ga. 138, 281 S. E. 2d 599, 599–600 (1981); *People* v. *Williams*, 97 Ill. 2d 252, 454 N. E. 2d 220 (1983); *State* v. *Stewart*, 225 Kan. 410, 415–417, 591 P. 2d 166, 170–172 (1979); *State* v. *Jones*, 408 So. 2d 1285, 1290 (La. 1982); *Lawrence* v. *State*, 51 Md. App. 575, 444 A. 2d 478 (1982); *Gaines* v. *State*, 404 So. 2d 557, 560 (Miss. 1981); *State* v. *Johnson*, 616 S. W. 2d 846, 849 (Mo. App. 1981); *People* v. *McCray*, 57 N. Y. 2d 542, 549, 443 N. E. 2d 915, 919 (1982), cert. denied, 461 U. S. 961 (1983); *State* v. *Lynch*, 300 N. C. 534, 546–547, 268 S. E. 2d 161, 168 (1980); *Lee* v. *State*, 637 P. 2d 879, 881–882 (Okla. Crim. App. 1981); *Commonwealth* v. *Henderson*, 497 Pa. 23, 26–34, 438 A. 2d 951, 952–956 (1981); *State* v. *Ucero*, 450 A. 2d 809, 812–813 (R. I. 1982) (exclusion based on gender); *State* v. *Thompson*, 276 S. C. 616, 624, 281 S. E. 2d 216, 220 (1981); *Drew* v. *State*, 588 S. W. 2d 562 (Tenn. Crim. App. 1979); *State* v. *Grady*, 93 Wis. 2d 1, 10–11, 286 N. W. 2d 607, 611 (App. 1979). (The trend in recent state-court decisions was called to my attention by another recently filed petition. See Pet. for Cert. in *Teague* v. *Illinois*, O. T. 1983, No. 82–6981 (filed June 20, 1983), cert. denied, *ante*, p. 867.)

[4] In three of these cases, an all-white or predominantly white jury sentenced a Negro defendant to death.

> nire, the excusing of jurors by the court, or the peremptory challenges exercised by the district attorney. This Court upheld a murder conviction where the State exercised its peremptory challenges to exclude all Negroes from the jury panel. *Irving* v. *State*, 228 So. 2d 266 (Miss. 1969), vacated as to death penalty, 408 U. S. 935 . . . (1972)."[5] *Id.*, at 645.

Next, in *Gaines* v. *State*, 404 So. 2d 557 (1981), the court wrote:

> "Appellant claims that his Sixth and Fourteenth Amendment rights were violated when the prosecution exercised its peremptory challenges on only the black members of the jury venire. Furthermore, the defendant argues that, in the wake of such action, the trial court erred in not quashing the petit jury.
>
> "The United States Supreme Court dealt with this issue in *Swain* v. *Alabama*, [380 U. S. 202 (1965)]. [Quotation omitted.]
>
> "For the reasons stated in *Swain*, the motion to quash the jury was properly denied." *Id.*, at 560.

Then in *Hughes* v. *State*, 420 So. 2d 1060 (1982), the Mississippi Supreme Court said:

> "[The victims] are white. The defendants are all black. They allege that the trial judge erred in permitting the state to exercise peremptory challenges so that no blacks sat on the jury. There is no claimed error as to the selection of the venire, or as to any challenge by the state for cause. There is no merit to this assignment. *Gaines* v. *State*, 404 So. 2d 557 (Miss. 1981)." *Id.*, at 1062.

Finally, the Mississippi Supreme Court discussed the problem in disposing of petitioner's appeal in this case:

> "After completion of the panel, the appellant requested that the record reflect all persons peremptorily excused by the

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[5] In *Irving*, the Mississippi Supreme Court merely paraphrased an earlier opinion and said: "[T]he State is not required to accept jurors simply because they belong to the same ethnic group as the defendant. Swain v. Alabama, 380 U. S. 202 . . . (1965); Brown v. Allen, 344 U. S. 443 . . . (1953)." *Irving* v. *State*, 228 So. 2d, at 270 (paraphrasing *Shinall* v. *State*, 199 So. 2d 251 (Miss.), cert. denied, 389 U. S. 1014 (1967)). In both *Irving* and *Shinall*, all-white juries sentenced Negro defendants to death.

> State were Negroes. Later, after selection of the alternate juror, and sequestration of the jury for the night, appellant filed a motion to quash the panel on that ground. The lower court overruled the motion and the appellant now asserts it was obvious those persons were excused from the jury solely on the basis of race in violation of the Sixth and Fourteenth Amendments in allowing systematic exclusion of Negroes from the jury.
>
> "In the capital murder case of *Gaines* v. *State*, 404 So. 2d 557 (Miss. 1981), the same question was presented to this Court. Relying upon *Swain* v. *Alabama*, [380 U. S. 202 (1965)], the Court held that exercise of such challenges did not constitute error. *See also Coleman* v. *State*, 378 So. 2d 640 (Miss. 1979)." 428 So. 2d 576, 579 (1983).

Although the issue has arisen repeatedly over the past four years, the Mississippi Supreme Court has not reexamined its peremptory challenges under the State Constitution. On the contrary, the court has simply looked to the Federal Constitution, determined that *Swain* v. *Alabama* is still good law, and rejected all claims that the use of peremptory challenges to exclude members of a particular race from the jury is unconstitutional.

While this Court attends the Brandeisian experiments in a handful of state courts, criminal defendants in Mississippi and numerous other States have no legal remedy for what a majority of this Court agrees may well be a constitutional defect in the jury selection process. Under the circumstances, I cannot abide by further delay. I would grant the petition.[6]

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[6] The State argues that we should deny the petition because petitioner claims that the trial court denied him a hearing on the prosecutor's use of peremptory challenges, when in fact the trial court held a hearing on precisely this question. While the State is correct that this petition makes ambiguous references to the denial of a hearing, I interpret petitioner's basic claim to be that the prosecutor's actions in this case established a prima facie case of selective exclusion of jurors on the basis of race in violation of the Sixth and Fourteenth Amendments. Petitioner argues, and I agree, that once a defendant has made out such a prima facie case, the burden shifts to the prosecution to show that its peremptory challenges were not impermissibly motivated. This claim was made at trial, and preserved on appeal. See *McCray* v. *New York*, 461 U. S. 961, 969 (1983) (MARSHALL, J., dissenting).

No. 82–6960. Clark *v.* Marston et al. Dist. Ct. App. Fla., 1st Dist. Motion of respondents for damages denied. Certiorari denied.

No. 83–27. Eliasen *v.* Green Bay & Western Railroad Co. et al. C. A. 7th Cir. Motion of respondents for damages denied. Certiorari denied. Reported below: 705 F. 2d 461.

No. 83–156. Veenkant *v.* Blake et al.; and Veenkant *v.* Corsiglia et al. C. A. 6th Cir. Motion of respondents Blake and Farrell for award of costs and damages denied. Certiorari denied. Reported below: 711 F. 2d 1061.

No. 83–163. Syria, Director, Division of Social Services, North Carolina Department of Human Resources, et al. *v.* Alexander et al. C. A. 4th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 707 F. 2d 780.

No. 83–167. Pfister *v.* American Airlines, Inc., et al. C. A. 9th Cir. Motion of petitioner to strike brief in opposition denied. Certiorari denied. Reported below: 698 F. 2d 1231.

No. 83–5304. Nickol *v.* Zimmerman et al. C. A. 3d Cir. Certiorari denied. Justice Blackmun would grant certiorari.

Rehearing Denied

No. 81–6908. Barclay *v.* Florida, 463 U. S. 939;
No. 82–401. Rice, Director, Department of Alcoholic Beverage Control of California *v.* Rehner, 463 U. S. 713;
No. 82–1696. Rasky *v.* City of Chicago et al., 462 U. S. 1119; and
No. 82–6080. Barefoot *v.* Estelle, Director, Texas Department of Corrections, 463 U. S. 880. Petitions for rehearing denied.

No. 81–2147. Arizona et al. *v.* San Carlos Apache Tribe of Arizona et al.; Arizona et al. *v.* Navajo Tribe of Indians et al; and
No. 81–2188. Montana et al. *v.* Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation et al., 463 U. S. 545. Petitions of Fort McDowell Mohave-Apache Indian Community et al. and San Carlos Apache Tribe et al. for rehearing denied.

No. 81–2245. NEVADA *v.* UNITED STATES ET AL.;

No. 81–2276. TRUCKEE-CARSON IRRIGATION DISTRICT *v.* UNITED STATES ET AL.; and

No. 82–38. PYRAMID LAKE PAIUTE TRIBE OF INDIANS *v.* TRUCKEE-CARSON IRRIGATION DISTRICT ET AL., 463 U. S. 110. Petition of Pyramid Lake Paiute Tribe of Indians for rehearing denied.

No. 82–486. UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 610, AFL–CIO, ET AL. *v.* SCOTT ET AL., 463 U. S. 825. Motion for leave to file petition for rehearing denied. JUSTICE POWELL would grant this motion.

No. 82–6633. MCCLAIN *v.* ORR ET AL., 462 U. S. 1136. Motion for leave to file petition for rehearing denied.

OCTOBER 11, 1983

Appeals Dismissed

No. 82–2151. FRESH POND SHOPPING CENTER, INC. *v.* CALLAHAN ET AL. Appeal from Sup. Jud. Ct. Mass. dismissed for want of substantial federal question. Reported below: 388 Mass. 1051, 446 N. E. 2d 1060.

JUSTICE REHNQUIST, dissenting.

Appellant, Fresh Pond Shopping Center, Inc., signed a purchase agreement in June 1979 whereby it would acquire a six-unit apartment building located adjacent to some property it already owned. Appellant planned to demolish the building and pave over the lot to provide parking to a commercial tenant of the shopping center. Because the apartment units were rent-controlled rental housing, under the terms of Cambridge City Ordinance 926 (1979) appellant first had to obtain permission from the Cambridge Rent Control Board to remove the property from the rental housing market. Although at the time the removal permit was sought only one of the six units was occupied, the Board denied the permit.

The Superior Court for Middlesex County held that under the decision of the Massachusetts Supreme Judicial Court in *Flynn* v. *City of Cambridge*, 383 Mass. 152, 418 N. E. 2d 335 (1981), the restrictions on removing the apartments from the rental market in Cambridge imposed by Ordinance 926 were constitutional. The decision of the Superior Court was affirmed by an equally divided Massachusetts Supreme Judicial Court. *Fresh Pond Shopping Center, Inc.* v. *Rent Control Board of Cambridge*, 388 Mass. 1051, 446 N. E. 2d 1060 (1983). I would note probable jurisdiction in this case because I believe the case presents important and difficult questions concerning the application of the Takings Clause of the Fifth Amendment, as made applicable to the States by the Fourteenth Amendment of the Constitution, which have not been decided before by this Court. They might be postponed or avoided if the case were here on certiorari, but the case is an appeal; we act on the merits whatever we do.

The primary feature of the Cambridge rent control statute, 1976 Mass. Acts, ch. 36, is to place virtually all residential rental property in Cambridge under control of the Cambridge Rent Control Board, whose members are appellees here. Owners of rent-controlled property are also prohibited from evicting tenants without first obtaining a certificate of eviction from the Rent Control Board. The statute limits issuance of eviction certificates to circumstances where tenants have committed certain improper acts. It preserves the landlord's right to obtain a certificate of eviction to recover possession of the property only for occupancy by the owner or certain of his family members, or if the property is to be removed from the housing market through demolition or otherwise.

Although the state enabling statute preserves in limited fashion a landlord's traditional right to evict a tenant in order to occupy a rental unit personally, Cambridge City Ordinance 926 eliminated the landlord's right to evict a tenant save when the Rent Control Board first issues a "removal" permit. Ordinance 926 delegates virtually unfettered discretion to the Board to determine whether to grant a removal permit. The Board may consider the benefits of denying removal to the tenants protected by rent control, the hardship upon existing tenants of the units sought to be removed, and the effect of removal on the proclaimed housing shortage in Cambridge. Nowhere does the ordinance suggest that these considerations be balanced against the landlord's right to put his property to other uses. In short, Ordinance 926 permits denying a "removal" permit in any situation.

The combined effect of the limitations imposed by the state enabling statute and Ordinance 926 is to deny appellant use of his property. Appellant, as a corporate entity, simply cannot occupy the remaining apartment for personal use. In effect, then, the

Rent Control Board has determined that until the remaining tenant decides to leave, appellant will be unable to vacate and demolish the building. In my view this deprives appellant of the use of its property in a manner closely analogous to a permanent physical invasion, like that involved in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982). In *Teleprompter* we were presented with the question whether a New York law that authorized a cable television company to install cable facilities on other persons' property without permission or effective compensation constituted a taking in violation of the Fifth and Fourteenth Amendments. Though the physical invasion was minor, we "conclude[d] that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Id.*, at 426. We called a permanent physical occupation of another's property "the most serious form of invasion of an owner's property interest." *Id.*, at 435.

As the Cambridge ordinance operates in this case, I fail to see how it works anything but a physical occupation of appellant's property. First, appellant's right to evict the tenant was limited by state law to two circumstances: occupation of the rental unit by the owner or certain members of his family, or demolition. The first of these rights is not available to appellant. The second, demolition, is controlled by Cambridge Ordinance 926, and under the administration of that ordinance by the Cambridge Rent Control Board, appellant has been denied the right to remove the unit from the housing market by demolition. It is not certain whether the Rent Control Board would, if the tenant decided to leave, determine that a demolition permit should issue, but it is clear that until the tenant decides to leave of his own volition, appellant is unable to possess the property.

There is little to distinguish this case from the situation confronting the Court in *Teleprompter*. As in *Teleprompter*, the power to end or terminate the physical invasion is under the control of a private party. As in New York, the Massachusetts Legislature can alter the rent control statute to provide appellant with some other means of restoring control of his property. But neither of these factors moved the Court away from its holding in *Teleprompter* that the physical invasion amounted to a taking. I must conclude, as the Court did in *Teleprompter*, that Ordinance 926 has effected a permanent physical invasion of appellant's property.

It might also be argued that the rent control provisions are justified by the emergency housing shortage in Cambridge, but the very fact that there is no foreseeable end to the emergency takes this case outside the Court's holding in *Block* v. *Hirsh*, 256 U. S. 135 (1921). At issue in *Block* was the constitutionality of a rent control statute enacted by Congress to regulate rents and rental practices in the District of Columbia. Like the rent control practices employed in Cambridge, the regulations disputed in *Block* fixed rents and denied the landlord the right to evict a tenant except to allow the owner or a member of his family to occupy the unit. We held the rent control statute constitutional because it was enacted to deal with a wartime emergency housing shortage. We noted that "[a] limit in time, to tide over a passing trouble, may well justify a law that could not be upheld as a permanent change." *Id.*, at 157. Thus, although we upheld a regulatory scheme in *Block* that is remarkably similar to that presently in force in the city of Cambridge, we reserved judgment as to whether such a regulatory scheme would be constitutional if it were made part of a permanent scheme. The Cambridge rent control ordinance presents the question thus reserved.

The provision in the Massachusetts statute ensuring a fair net operating income to the landlord does not change the result that should attend this case. In previous decisions we have recognized that property ownership carries with it a bundle of rights, including the right "'to possess, use and dispose of it.'" *Teleprompter, supra*, at 435 (quoting *United States* v. *General Motors Corp.*, 323 U. S. 373, 378 (1945)). Though no issue is raised here that the rent paid by the tenant is insufficient, that fact does not end the inquiry. What has taken place is a transfer of control over the reversionary interest retained by appellant. This power to exclude is "one of the most treasured strands in an owner's bundle of property rights [,because] even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger would ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property." *Teleprompter, supra*, at 435–436. Cf. *Bowles* v. *Willingham*, 321 U. S. 503, 517 (1944) (constitutional wartime rent control did not require owner to offer accommodations for rent). Nothing in the rent control provisions requires the Board to compensate appellant for the loss of control over the use of its property.

No. 83-101. IOWANS FOR TAX RELIEF ET AL. *v.* CAMPAIGN FINANCE DISCLOSURE COMMISSION ET AL. Appeal from Sup. Ct. Iowa dismissed for want of substantial federal question. Reported below: 331 N. W. 2d 862.

No. 83-303. MANIATES *v.* CITY OF LYNCHBURG ET AL. Appeal from Sup. Ct. Va. dismissed for want of substantial federal question.

No. 83-5253. OSTROWSKI *v.* CITY OF JOLIET, ILLINOIS. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question.

Certiorari Granted—Vacated and Remanded

No. 82-1739. FUNDACION EDUCATIVA ANA G. MENDEZ ET AL. *v.* SUAREZ ET AL. Sup. Ct. P. R. Motion of respondents Berta Gallego et al. for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Operating Engineers* v. *Jones*, 460 U. S. 669 (1983). Reported below: —— P. R. R. ——.

Miscellaneous Orders

No. — – ——. P STONE, INC. *v.* KOPPERS CO., INC., ET AL. Motion to direct the Clerk to file the petition for writ of certiorari out of time denied.

No. A-145. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* LOPEZ ET AL. D. C. C. D. Cal. Motion of respondents to vacate the stay entered by JUSTICE REHNQUIST on September 9, 1983 [463 U. S. 1328], denied.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting in part.

The Secretary of Health and Human Services (Secretary) has taken the position that she may, at any time, terminate the payment of disability benefits to persons who have previously been found to be disabled and entitled to benefits under Titles II and XVI of the Social Security Act notwithstanding the complete absence of evidence that the recipient's medical condition has improved. In maintaining this position, the Secretary refused to follow the settled law in the Ninth Circuit, which requires her to adduce some evidence of medical improvement before terminating disability benefits. See *Patti* v. *Schweiker*, 669 F. 2d 582 (1982); *Finnegan* v. *Matthews*, 641 F. 2d 1340 (1981). Nevertheless, for the purposes of the stay application under review, the Secretary assumes that the Ninth Circuit's interpretation of the law is correct. Her stay application was predicated entirely on procedural grounds. A review of the procedural history of the case is therefore necessary.

Respondents filed a class action in the United States District Court for the Central District of California challenging the Secretary's policy. On June 16, 1983, the District Court entered an injunction requiring the Secretary to comply with the law of the Ninth Circuit with respect to recipients of disability benefits who reside in that Circuit. The only portion of the District Court's injunction presently at issue in this Court is ¶4(c), which applies to all persons whose disability benefits have been terminated since August 30, 1981 (or August 25, 1980, in the case of recipients who were "grandfathered" into the federal program from state disability programs). Paragraph 4(c) enjoins the Secretary to notify all such persons that they may reapply for benefits, and upon reapplication, to reinstate their benefits pending a termination hearing at which the Secretary must produce some evidence of medical improvement.[1] It is this portion of the District Court's injunction which JUSTICE REHNQUIST, acting as Circuit Justice, stayed pending the Secretary's appeal to the Ninth Circuit. 463 U. S. 1328 (1983).

Today the Court declines to vacate the stay entered by JUSTICE REHNQUIST. Of course, in considering a motion of this kind, substantial deference must be paid to the judgment of the Circuit Justice. See *Rosenberg* v. *United States*, 346 U. S. 273, 286–287 (1953). The Circuit Justice's decision should not be disturbed simply because the other Members of the Court would have declined to grant the stay as an original matter. Nonetheless, there are cases in which reexamination is proper, see *id.*, at 287–288; I am persuaded that this is such a case.

In JUSTICE REHNQUIST's view, the District Court's injunction extended to persons over whom the District Court had no jurisdiction. That conclusion does not, however, justify a stay of the injunction to the extent that it granted relief to persons over whom the District Court does have jurisdiction. Moreover, the extent of the overbreadth is less than JUSTICE REHNQUIST assumed when he was persuaded to enter his stay.

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[1] Once the Secretary meets her burden of production, the burden of proof is on the recipient to prove he or she remains disabled.

The jurisdiction of the District Court over this action was based on 49 Stat. 624, as amended, 42 U. S. C. § 405(g) (1976 ed., Supp. V), which provides in pertinent part:

> "Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow."

Under the statute, persons whose benefits have been terminated must seek judicial review of their termination within 60 days of a "final decision" of the Secretary. It is my understanding that this class action was filed on February 4, 1983, and that the class certified by the District Court includes persons who were entitled to seek judicial review of an adverse final decision by the Secretary more than 60 days before February 4, 1983 (December 6, 1982), but who failed to do so. As I understand ¶ 4(c) of the injunction entered by the District Court, it grants relief to class members over whom the District Court had no jurisdiction—specifically, to class members who had received "final decisions" from the Secretary more than 60 days prior to February 4, 1983, and who had not timely sought judicial review. To the extent that the stay entered by JUSTICE REHNQUIST applies to such persons, I agree that it was properly entered. These persons' right to seek administrative or judicial review of their termination decisions had expired, and they could obtain benefits only by requesting that the Secretary reopen their cases. However, the District Court had no jurisdiction to review the Secretary's refusal to reopen these cases. *Califano* v. *Sanders*, 430 U. S. 99 (1977). Hence, the District Court had no jurisdiction over these persons and should not have granted them relief, see *Califano* v. *Yamasaki*, 442 U. S. 682, 701, 704 (1979); *Mathews* v. *Diaz*, 426 U. S. 67, 71, n. 3 (1976).

I believe, however, that the motion to vacate the stay should be granted insofar as it applies to persons who sought judicial review of a termination of their benefits ordered by the Secretary on or after December 6, 1982, and persons whose right to administrative review of that termination had not expired before December 6, 1982. As to these persons, I believe both the waivable and nonwaivable elements of 42 U. S. C. § 405(g) (1976 ed., Supp. V) were satisfied; hence the District Court had jurisdiction to enter injunctive relief.

The nonwaivable exhaustion requirement is simply the requirement that the Secretary have made some sort of decision on a claim for benefits. "The nonwaivable element is the requirement that a claim for benefits shall have been presented to the Secretary. Absent such a claim there can be no 'decision' of any type. And some decision by the Secretary is clearly required by the statute." *Mathews* v. *Eldridge*, 424 U. S. 319, 328 (1976). As I understand the submissions of the parties, every class member had returned a questionnaire distributed by the Secretary and had thereby indicated in writing that he or she was still disabled and desired benefits. Thus, all of them had made adequate claims to continued benefits. Their benefits were terminated on the basis of a regulation that is assumed for the purpose of this proceeding to be invalid. In terminating benefits after receiving these questionnaires, it cannot be doubted that the Secretary knew these individuals claimed an entitlement to continue to receive disability benefits or that she then, by terminating their benefits, made a "decision" on the merits of their claims. That is all the nonwaivable element of the statute requires. As the Court expressly held in *Eldridge*, "§ 405(g) requires *only* that there be a 'final decision' by the Secretary with respect to the claim of entitlement to benefits." *Id.*, at 329 (emphasis supplied). In fact, the questionnaires returned by these respondents made the same claim and received the same decision that was held sufficient to satisfy the statute in *Mathews* v. *Eldridge*.[2]

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[2] With respect to the nonwaivable requirement, the *Eldridge* Court wrote: "Eldridge has fulfilled this crucial prerequisite. Through his answers to the state agency questionnaire, and his letter in response to the tentative determination that his disability had ceased, he specifically presented the claim that his benefits should not be terminated because he was still disabled. This claim was denied by the state agency and its decision was accepted by the [Secretary]." 424 U. S., at 329.

All the members of the respondent class answered a questionnaire substantially identical to the one Eldridge answered, indicating that they believed they were still disabled and entitled to benefits. Thus, each class member specifically presented a "claim." The only difference between this case and Eldridge's is that in response to the letter informing Eldridge that he would be terminated and requesting any additional evidence Eldridge might choose to submit, Eldridge wrote a letter. Some unidentified percentage of the respondent class presumably also wrote letters similar to this one, and in any event the Secretary does not rely on the absence of a letter to distinguish this case from *Eldridge*. Moreover, Eldridge's letter hardly added to the "claim" he had already presented. In fact the letter did little more than state that

Mathews v. *Eldridge* also makes it clear that the waivable element of the statute has been satisfied. As was true in that case, further administrative review might have enabled a claimant to recover retroactive benefits but could not have vindicated the right to have correct procedures followed *before* the request for continued benefits was denied. As I understand respondents' position on the merits, they assert that a recipient need not respond at all to a claim that he or she is no longer disabled unless the Secretary first comes forward with some evidence that his or her condition has improved. There is no way that right can be vindicated in the administrative process—the Secretary has already taken a firm position on the issue which the administrative judges are not free to ignore.[3] Even if the recipient is ultimately determined to be eligible for benefits for some other reason, the administrative process cannot vindicate the right asserted in this litigation, and hence further exhaustion of administrative remedies as to the claim made in this case is unnecessary. *Eldridge, supra*, at 330–332. When exhaustion is futile, this element may be deemed waived even over the Secretary's objection. *Mathews* v. *Diaz, supra*, at 75–77; see also *Eldridge, supra*, at 328, 330. I agree with JUSTICE REHNQUIST that respondents' contention that their claim is a "constitutional" one should be disregarded, but it should make no difference whether plaintiffs' claim is based on the statute or the Constitution. Even as to a statutory claim which could not be sustained on administrative review, "further exhaustion would not merely be futile for the applicant, but would also be a commitment of administrative resources unsupported by any administrative or judicial interest." *Weinberger* v. *Salfi*, 422 U. S. 749, 765–766 (1975). Congress could not have intended such a result.[4]

Eldridge believed the Secretary already had enough evidence to decide the case. See *id.*, at 324; App. in *Mathews* v. *Eldridge*, O. T. 1974, No. 74–204, pp. 13–14. This letter was hardly a new "claim"; Eldridge's "claim" which satisfied the nonwaivable element of the statute had already been made.

[3] "It is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient . . . in an adjudicatory context." 424 U. S., at 330.

[4] It is not clear that the Secretary disagrees with my view. In her memorandum opposing respondents' application to vacate the stay, she accepts the propriety of the District Court's injunction as to persons that have exhausted their administrative remedies within 60 days of the filing of this action, and argues, correctly in my view, that the stay was proper as to persons whose

In reaching this conclusion, I express no opinion on the merits of the underlying controversy because the Secretary has assumed, for the purpose of our consideration of the stay application, that the Ninth Circuit's requirement that the Secretary produce some evidence of medical improvement is sound.

Of course, in considering the motion to vacate the stay, it is also essential to balance the equities. However, as JUSTICE REHNQUIST recognized, the equities in this case strongly favor respondents, who are elderly, sick, or disabled persons to whom disability benefits may be crucial. Moreover, as JUSTICE REHNQUIST also recognized, this is a stay pending appeal to the Court of Appeals rather than a stay pending disposition of a petition for certiorari to this Court, and in such a case the granting of a stay by a Circuit Justice should be extremely rare and great deference should be shown to the judgment of the Court of Appeals. When these factors are also considered, I am compelled to conclude that the stay entered by JUSTICE REHNQUIST should be modified.

In summary, I would grant the motion to vacate the stay insofar as it relates to those class members (a) whose benefits were terminated on or after December 6, 1982, as well as (b) those whose right to seek administrative review of the termination of their benefits had not expired as of December 6, 1982. To the extent that the Court declines to modify the stay in this fashion, I respectfully dissent.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Before the Court is an emergency motion to vacate a stay granted by JUSTICE REHNQUIST pending appeal to the United States Court of Appeals for the Ninth Circuit. 463 U. S. 1328 (1983). In my view, the merits of the underlying jurisdictional issues are far from certain, while the equities clearly favor the class

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right to review had expired more than 60 days before the filing of the suit. She goes on to argue only that the injunction should not apply to persons who are still pursuing their administrative remedies at this time. She does not explicitly quarrel with my conclusion that the District Court's injunction was proper as to all other persons whose right to seek administrative review had not expired as of December 6, 1982. Therefore, it appears that my only difference with the Secretary is that I would not require persons currently seeking administrative review to exhaust what is a futile remedy.

of recipients whose disability benefits have been terminated. I would therefore vacate the stay.

The stay is specifically directed at ¶4(c) of a preliminary injunction issued by the District Court, which would have required that the Secretary reinstate the disability benefits of any applicant who requests such reinstatement in response to a notice already distributed by the Secretary. The stayed portions of the injunction also would have allowed the Secretary to terminate these benefits, after subsequent hearings, but only if the Secretary properly applied prior decisions of the Court of Appeals for the Ninth Circuit when conducting those hearings. See *Patti* v. *Schweiker*, 669 F. 2d 582 (1982), and *Finnegan* v. *Matthews*, 641 F. 2d 1340 (1981) (in hearings to terminate disability benefits on the ground that the recipient is no longer disabled, the Secretary has burden of producing evidence of an improvement in medical condition). Thus, the question presented by the motion to vacate JUSTICE REHNQUIST's stay is whether the payment of interim benefits to approximately 30,000 disabled individuals whose Social Security benefits have been terminated by the Secretary should be continued pending final decision on the merits by the Court of Appeals.

The standard traditionally applied by a Circuit Justice when considering a stay application is whether there is a reasonable probability that four Justices would vote to grant certiorari, whether there is a fair prospect that a majority of the Court would conclude that the decision below was erroneous, and whether a balancing of the equities suggests that a stay should or should not be granted. See *Gregory-Portland Independent School District* v. *United States*, 448 U. S. 1342 (1980) (REHNQUIST, J., in chambers); *Rostker* v. *Goldberg*, 448 U. S. 1306, 1308 (1980) (BRENNAN, J., in chambers). Included within this last criterion, of course, is consideration of whether the applicant has demonstrated that irreparable harm is likely to result from the denial of the stay. Moreover, given the respect that is accorded interlocutory decisions of the lower federal courts, a stay application to a Circuit Justice on a matter still pending before a court of appeals, and on which the lower courts have already denied an interim stay, should be granted only in the most extraordinary cases. See *O'Rourke* v. *Levine*, 80 S. Ct. 623, 624, 4 L. Ed. 2d 615, 616 (1960) (Harlan, J., in chambers).

JUSTICE REHNQUIST accepted the conclusion of the lower court that the "balance of hardships tips sharply toward the [recipients]." He nonetheless granted the stay because he was of the view that the likelihood that the Secretary would prevail on the various jurisdictional issues raised negates giving controlling consideration to the irreparable harm caused by the stay. I am not as optimistic, however, about the prospects for success on the merits of the Secretary's claims, and therefore I find the overwhelming hardships imposed on the recipients to be determinative.

For purposes of the present motion, I accept JUSTICE REHNQUIST's conclusion that there is a reasonable probability that issues relating to the proper scope of the injunction issued by the District Court would garner enough votes for plenary consideration by the Court. I do not agree, however, that there is a fair prospect of success on the merits of these claims such that the Court ultimately would vacate or substantially amend the injunction issued by the District Court. When refusing to issue a stay pending appeal, the Court of Appeals filed a lengthy opinion clearly explaining why the beneficiaries in this case satisfied the jurisdictional requirements of 42 U. S. C. §§ 405(g), 405(h) (1976 ed. and Supp. V). 713 F. 2d 1432 (1983). Specifically, the court concluded (1) that termination of benefits by the Secretary satisfies the nonwaivable requirement that recipients first present a claim to the Secretary, see, *e. g.*, *Mathews* v. *Eldridge*, 424 U. S. 319, 328–330 (1976); *Wilson* v. *Edelman*, 542 F. 2d 1260, 1270–1271 (CA7 1976); (2) that the waivable requirement of a final decision by the Secretary has been met because regulations made exhaustion of administrative remedies futile or, alternatively, because exhaustion of the recipients' constitutional claim is not required, see, *e. g.*, *Mathews* v. *Diaz*, 426 U. S. 67, 75–77 (1976); and (3) that the requirement that appeals be filed within 60 days of the Secretary's decision has been waived by the Secretary due to her failure to raise the issue before the District Court. Although after plenary consideration I might agree with much of JUSTICE STEVENS' analysis, I do not believe it is necessary at this time to provide further support for the conclusions reached by the Court of Appeals. Suffice it to say that, largely for the reasons stated by that court's opinion, and for the reasons specified by the large body of case law to which that opinion referred, I am far from convinced that the injunction issued by the District Court was jurisdictionally barred. See also *Kuehner* v. *Schweiker*, No. 82-1514 (CA3 Sept. 19, 1983). Indeed, even if, as JUSTICE STEVENS suggests, one or more of these holdings eventually proves erroneous and thereby eliminates jurisdiction over some members of the class, it is indisputable that many remaining recipients have properly presented their claims to the District Court. Accordingly, the probability of success on the merits is clearly not as certain as JUSTICE REHNQUIST has suggested.

Nor does the alleged judicial interference in the administrative process, which JUSTICE REHNQUIST's opinion emphasized, add to the likely success of the Secretary's appeal. In the situation presented by this motion, it is clear to me that it is the Secretary who has not paid due respect to a coordinate branch of Government by expressly refusing to implement the binding decisions of the Ninth Circuit. This is, indeed, the essence of the recipients' constitutional allegation of nonacquiescence on the part of the Secretary.

At most, therefore, the likelihood of success on the merits is very much in doubt. Therefore, when considering whether or not to grant a stay pending appeal, this factor cannot by itself dictate the result. Rather, it becomes necessary to balance the equities; and, in my view, the overwhelming evidence of irreparable harm that accompanies any termination of disability benefits should be the determinative factor in this emergency application.

As noted, on this consideration JUSTICE REHNQUIST accepted the lower courts' assessment of the comparative harms. I agree. Indeed, as the courts below correctly concluded, termination of the benefits in this case has caused "deprivation of life's necessities, further illness, or even death from the very disabilities that the Secretary deemed [the class members] not to have." Any financial or administrative inconvenience suffered by the Secretary cannot outweigh, or even approach, the human suffering that has been imposed on those disabled recipients of Social Security benefits who have been wrongfully terminated. And as the courts below noted, the potential payment of retroactive benefits after final decision in this case will do little to compensate the recipients for their current deprivations.

In sum, there is little question in my mind that the extraordinary circumstances necessary to stay the decision of the lower court cannot be found in this case. Accordingly, I would grant the emergency motion to vacate the stay, and allow the ordinary appeals process to proceed.

No. A–207. BRIMM *v.* UNITED STATES. C. A. 11th Cir. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. 8, Orig. ARIZONA *v.* CALIFORNIA ET AL. Motion for comments on the proposed decrees submitted by the State parties and the Solicitor General is granted, and the parties are allowed until November 10, 1983, within which to file comments. JUSTICE MARSHALL took no part in the consideration or decision of this order. [For earlier order herein, see, *e. g.*, 462 U. S. 1146.]

No. 86, Orig. LOUISIANA *v.* MISSISSIPPI ET AL. Exceptions to the Report of the Special Master are set for oral argument in due course. [For earlier order herein, see, *e. g.*, 463 U. S. 1204.]

No. 94, Orig. SOUTH CAROLINA *v.* REGAN, SECRETARY OF THE TREASURY. Motion of the City of Baltimore et al. for leave to file a brief as *amici curiae* granted. [For earlier order herein, see, *e. g.*, *ante*, p. 807.]

No. 81–757. ALLEN *v.* WRIGHT ET AL.; and

No. 81–970. REGAN, SECRETARY OF THE TREASURY, ET AL. *v.* WRIGHT ET AL. C. A. D. C. Cir. [Certiorari granted, 462 U. S. 1130.] Motion of the Solicitor General for divided argument granted.

No. 82–687. UNITED STATES *v.* ARTHUR YOUNG & CO. ET AL. C. A. 2d Cir. [Certiorari granted, 459 U. S. 1199.] Motion of Arthur Andersen & Co. et al. for leave to participate in oral argument as *amici curiae*, for divided argument, and for additional time for oral argument denied. Motion of respondents for divided argument granted.

No. 82–708. SUMMA CORP. *v.* CALIFORNIA EX REL. STATE LANDS COMMISSION ET AL. Sup. Ct. Cal. [Certiorari granted, 460 U. S. 1036.] Motion of National Audubon Society et al. for leave to file a brief as *amici curiae* granted

No. 82–963. MASSACHUSETTS *v.* SHEPPARD. Sup. Jud. Ct. Mass. [Certiorari granted, 463 U. S. 1205.] Motion of Florida for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied.

No. 82–898. MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES *v.* KNIGHT ET AL.; and

No. 82–977. MINNESOTA COMMUNITY COLLEGE FACULTY ASSN. ET AL. *v.* KNIGHT ET AL. D. C. Minn. [Probable jurisdiction noted, 460 U. S. 1050.] Motion of appellants in No. 82–977 to strike appellees' brief denied.

No. 82–945. SURE-TAN, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. [Certiorari granted, 460 U. S. 1021.] Motion of United Farm Workers of America, AFL–CIO, for leave to file a supplemental brief as *amicus curiae* denied. Motions of American Federation of Labor and Congress of Industrial Organizations and California Rural Legal Assistance Foundation for leave to file briefs as *amici curiae* granted.

No. 82–1047. UNITED STATES *v.* ONE ASSORTMENT OF 89 FIREARMS. C. A. 4th Cir. [Certiorari granted, 459 U. S. 1199.] Motion of Jerome N. Frank Legal Services Organization for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 82–1186. TRANS WORLD AIRLINES, INC. *v.* FRANKLIN MINT CORP. ET AL.; and

No. 82–1465. FRANKLIN MINT CORP. ET AL. *v.* TRANS WORLD AIRLINES, INC. C. A. 2d Cir. [Certiorari granted, 462 U. S. 1118.] Motion of Mark Hammerschlag and Ellen Van Fleet for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 82–1771. UNITED STATES *v.* LEON ET AL. C. A. 9th Cir. [Certiorari granted, 463 U. S. 1206.] Motion of respondents for divided argument granted. Motion of respondents for additional time for oral argument denied.

No. 83–380. IN RE WATERS. Petition for writ of habeas corpus denied.

No. 83–5251. IN RE BANKS ET AL. Petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 83-196. RUCKELSHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY *v.* MONSANTO CO. Appeal from D. C. E. D. Mo. Probable jurisdiction noted. JUSTICE WHITE took no part in the consideration or decision of this case. Reported below: 564 F. Supp. 552.

Certiorari Granted

No. 82-2113. RICHARDSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari granted. Reported below: 226 U. S. App. D. C. 342, 702 F. 2d 1079.

No. 82-1608. SOUTH-CENTRAL TIMBER DEVELOPMENT, INC. *v.* LERESCHE, COMMISSIONER, DEPARTMENT OF NATURAL RESOURCES OF ALASKA, ET AL. C. A. 9th Cir. Motion of Pacific Rim Trade Association et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. Reported below: 693 F. 2d 890.

No. 83-1. KOEHLER, WARDEN *v.* ENGLE. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 707 F. 2d 241.

Certiorari Denied

No. 82-1762. TRUSTEES OF REX HOSPITAL ET AL. *v.* HOSPITAL BUILDING CO. C. A. 4th Cir. Certiorari denied. Reported below: 691 F. 2d 678.

No. 82-1879. ROUSSEAU *v.* NIX. C. A. 10th Cir. Certiorari denied.

No. 82-1895. KREBS *v.* KREBS. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 82-1961. SCHIAVONI, AKA FOMAGE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 709 F. 2d 1496.

No. 82-1984. SMITH *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 278 Ark. 462, 648 S. W. 2d 792.

No. 82-2040. THOMAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 705 F. 2d 709.

No. 82-2072. IN RE HISS. C. A. 2d Cir. Certiorari denied. Reported below: 722 F. 2d 727.

No. 82-6710. KEENAN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 82-6722. DRAPER *v.* DEPARTMENT OF CORRECTIONS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 707 F. 2d 506.

No. 82-6749. HOLLOWAY *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Ct. Crim. App. Tex. Certiorari denied.

No. 82-6763. BROWN *v.* REPUBLIC STEEL CORP. C. A. 11th Cir. Certiorari denied. Reported below: 698 F. 2d 1236.

No. 82-6764. WILFORD *v.* JAGO. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 731.

No. 82-6823. MCDANIEL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 82-6832. JONES *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 429 So. 2d 396.

No. 82-6909. BASHLOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 696 F. 2d 277.

No. 82-6969. VETETO *v.* WARDEN, UNITED STATES PENITENTIARY. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1512.

No. 83-21. AMERICAN TELEPHONE & TELEGRAPH CO. *v.* MCI COMMUNICATIONS CORP. ET AL.;

No. 83-32. MCI COMMUNICATIONS CORP. ET AL. *v.* AMERICAN TELEPHONE & TELEGRAPH CO.; and

No. 83-217. AMERICAN TELEPHONE & TELEGRAPH CO. *v.* MCI COMMUNICATIONS CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 708 F. 2d 1081.

No. 83-30. BAGBY ET AL. *v.* VANCE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 705 F. 2d 466.

No. 83-50. GROLIER INC. ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 699 F. 2d 983.

No. 83-55. ARMILIO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 705 F. 2d 939.

No. 83-59. AMERICAN INTERNATIONAL COAL CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 709 F. 2d 1490.

No. 83-66. COLOMA COMMUNITY SCHOOL DISTRICT *v.* BERRY ET AL.; and

No. 83-254. FELLNER ET AL. *v.* BERRY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 813.

No. 83-75. SAAVEDRA, INDIVIDUALLY, AND DBA SAAGAN MOVING & STORAGE CO. *v.* DONOVAN, SECRETARY OF LABOR. C. A. 9th Cir. Certiorari denied. Reported below: 700 F. 2d 496.

No. 83-84. BALK *v.* UNITED STATES INTERNATIONAL COMMUNICATION AGENCY ET AL. C. A. D. C. Cir. Certiorari denied.

No. 83-107. COMMITTEE FOR AN INDEPENDENT P-I ET AL. *v.* SMITH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 704 F. 2d 467.

No. 83-109. FIRST ARABIAN CORP., S.A. *v.* PHARAON. C. A. 6th Cir. Certiorari denied. Reported below: 711 F. 2d 1058.

No. 83-116. SHAHEED *v.* ADAM METAL & SUPPLY CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 714 F. 2d 124.

No. 83-125. PENNTECH PAPERS, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 706 F. 2d 18.

No. 83-127. HAMMERHEAD ENTERPRISES, INC., ET AL. *v.* BREZENOFF ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 707 F. 2d 33.

No. 83-152. KARAPINKA *v.* UNION CARBIDE CORP. ET AL. C. A. 3d Cir. Certiorari denied.

No. 83-178. WESTERN COMPANY OF NORTH AMERICA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 699 F. 2d 264.

No. 83-188. OLSEN ET AL. *v.* CBS MUSICAL INSTRUMENTS, A DIVISION OF COLUMBIA BROADCASTING SYSTEMS, INC. C. A. 10th Cir. Certiorari denied.

No. 83–202. CITY OF COLUMBIA, MISSOURI *v.* PAUL N. HOWARD CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 707 F. 2d 338.

No. 83–210. IVEY ET AL. *v.* FISHER. Super. Ct. Ga., Cherokee County. Certiorari denied.

No. 83–211. LOWRY ET AL. *v.* BALTIMORE & OHIO RAILROAD CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 707 F. 2d 721.

No. 83–212. WYNN OIL CO. *v.* SOUTHERN UNION EXPLORATION COMPANY OF TEXAS. Ct. App. N. M. Certiorari denied.

No. 83–214. ONE PARCEL OF LAND IN MONTGOMERY COUNTY, MARYLAND, ET AL. *v.* WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY. C. A. 4th Cir. Certiorari denied. Reported below: 706 F. 2d 1312.

No. 83–215. BRIDGES *v.* CAPE PUBLICATIONS, INC., ET AL. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 423 So. 2d 426.

No. 83–220. NATIONS ET UX. *v.* SUN OIL CO. (DELAWARE) ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 695 F. 2d 933 and 705 F. 2d 742.

No. 83–221. MESTRE, PERSONAL REPRESENTATIVE OF THE ESTATE OF MESTRE *v.* PITNEY BOWES, INC. C. A. 11th Cir. Certiorari denied. Reported below: 701 F. 2d 1365.

No. 83–223. DUGGAN *v.* BERDIN. C. A. 11th Cir. Certiorari denied. Reported below: 701 F. 2d 909.

No. 83–224. ADAMS CENTRAL SCHOOL DISTRICT NO. 090 ET AL. *v.* DEIST ET AL. Sup. Ct. Neb. Certiorari denied. Reported below: 214 Neb. 307, 334 N. W. 2d 775.

No. 83–230. GUARD ET AL. *v.* KILBURN. Sup. Ct. Ohio. Certiorari denied. Reported below: 5 Ohio St. 3d 21, 448 N. E. 2d 1153.

No. 83–231. BURRELL ET AL. *v.* COUNTY OF SACRAMENTO, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 709 F. 2d 1514.

No. 83-232. GEORGIA STATE BOARD OF NATUROPATHIC EXAMINERS ET AL. *v.* BOWERS, ATTORNEY GENERAL OF GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 708 F. 2d 732.

No. 83-237. M. W. ZACK METAL CO., INC. *v.* LONDON STEAMSHIP MUTUAL INSURANCE ASSN., LTD., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 1444.

No. 83-239. CRAWFORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 714 F. 2d 143.

No. 83-241. OLSON MOTOR CO. ET AL. *v.* GENERAL MOTORS CORP. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 703 F. 2d 284.

No. 83-246. MACKEY *v.* GRAHAM, STATE AUDITOR OF WASHINGTON, ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 99 Wash. 2d 572, 663 P. 2d 490.

No. 83-248. NEW ENGLAND TOYOTA DISTRIBUTOR, INC. *v.* JAY EDWARDS, INC. C. A. 1st Cir. Certiorari denied. Reported below: 708 F. 2d 814.

No. 83-249. EVERITT ET AL. *v.* CITY OF MARSHALL, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 703 F. 2d 207.

No. 83-250. GIBSON *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 665 P. 2d 1302.

No. 83-261. GABLE ET AL. *v.* SAMES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 716 F. 2d 892.

No. 83-262. CHEECHAKO LEASING CO. *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 83-267. BROWNFIELD *v.* CITY OF LAGUNA BEACH ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 705 F. 2d 466.

No. 83-268. MICHELIN TIRE CORP., COMMERCIAL DIVISION *v.* BOSTICK OIL CO., INC. C. A. 4th Cir. Certiorari denied. Reported below: 702 F. 2d 1207.

No. 83-269. SEGREST *v.* SEGREST. Sup. Ct. Tex. Certiorari denied. Reported below: 649 S. W. 2d 610.

No. 83-274. ADAMS *v.* CITY OF SHEPHERDSVILLE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 711 F. 2d 1055.

No. 83-281. THOMPSON *v.* THOMPSON. Sup. Ct. Ill. Certiorari denied. Reported below: 96 Ill. 2d 67, 449 N. E. 2d 88.

No. 83-304. LANDY *v.* FEDERAL AVIATION ADMINISTRATION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 705 F. 2d 624.

No. 83-309. DUNCAN *v.* HUNTINGTON PARK REDEVELOPMENT AGENCY. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 142 Cal. App. 3d 17, 190 Cal. Rptr. 744.

No. 83-312. CORRICELLI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 720 F. 2d 657.

No. 83-313. LITTLE *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 83-316. LEONE ET AL. *v.* COSMOPOLITAN SHIPPING CO., S.A. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 1444.

No. 83-318. LAMAINA ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 714 F. 2d 125.

No. 83-326. RESNICK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 716 F. 2d 893.

No. 83-327. HALSELL *v.* LOCAL UNION NO. 5, BRICKLAYERS & ALLIED CRAFTSMEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 706 F. 2d 313.

No. 83-335. AMERICAN JEWISH CONGRESS *v.* UNITED STATES DEPARTMENT OF THE TREASURY. C. A. D. C. Cir. Certiorari denied. Reported below: 230 U. S. App. D. C. 70, 713 F. 2d 864.

No. 83-350. INTERNATIONAL STUDIO APARTMENT ASSN., INC., ET AL. *v.* LOCKWOOD, CLERK OF THE CIRCUIT COURT, SEVENTEENTH JUDICIAL CIRCUIT OF FLORIDA, ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 421 So. 2d 1119.

No. 83-360. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 709 F. 2d 1519.

No. 83-364. HARDIN ET AL. *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 83-369. UDOFOT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 711 F. 2d 831.

No. 83-370. DUFFELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 714 F. 2d 155.

No. 83-375. ZINMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 723 F. 2d 899.

No. 83-393. CASORIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1442.

No. 83-404. SIMMERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 714 F. 2d 134.

No. 83-5039. DAVIS *v.* WELDON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 703 F. 2d 580.

No. 83-5147. GRAHAM *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 90 App. Div. 2d 198, 457 N. Y. S. 2d 962.

No. 83-5221. PLAIN *v.* CITY OF BATON ROUGE. 19th Jud. Dist. Ct. La., East Baton Rouge Parish. Certiorari denied.

No. 83-5222. LAING *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 708 F. 2d 1568.

No. 83-5226. HOLGUIN *v.* RAINES, SUPERINTENDENT, ARIZONA STATE PRISON. C. A. 9th Cir. Certiorari denied. Reported below: 695 F. 2d 372.

No. 83-5229. MCKINON *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 705 F. 2d 419.

No. 83-5237. BACHNER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 706 F. 2d 1121.

No. 83-5238. HARRIS *v.* HAYES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 709 F. 2d 1515.

No. 83-5240. FAISON *v.* THORNTON ET AL. C. A. 11th Cir. Certiorari denied.

No. 83–5241. GUYTON *v.* RICKETTS, DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS. C. A. 10th Cir. Certiorari denied.

No. 83–5243. THOMPSON *v.* STEELE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 709 F. 2d 381.

No. 83–5244. TUCKER *v.* LONDON GOLD EXCHANGE. C. A. 3d Cir. Certiorari denied.

No. 83–5245. ADAMS *v.* BARNES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 712 F. 2d 1417.

No. 83–5249. FLOYD *v.* ALLEN, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 83–5262. COATS *v.* ALLSBROOK, SUPERINTENDENT, ODOM COMPLEX, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 707 F. 2d 505.

No. 83–5265. BRADY *v.* MINTZES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 716 F. 2d 902.

No. 83–5268. HOLDER *v.* STEPHENSON, SUPERINTENDENT, NORTH CAROLINA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 707 F. 2d 507.

No. 83–5271. PAREZ *v.* CITY AND COUNTY OF SAN DIEGO ET AL. C. A. 9th Cir. Certiorari denied.

No. 83–5275. SPRIGGS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 652 S. W. 2d 405.

No. 83–5277. FEARS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 707 F. 2d 522.

No. 83–5279. ATTWELL ET AL. *v.* METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 704 F. 2d 1252.

No. 83–5281. KNIGHTEN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 702 F. 2d 59 and 705 F. 2d 777.

No. 83–5284. CAULEY *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1439.

No. 83-5285. HARRIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 714 F. 2d 155.

No. 83-5288. BILLUPS *v.* MASSACHUSETTS. Ct. App. Mass. Certiorari denied. Reported below: 13 Mass. App. 963, 432 N. E. 2d 105.

No. 83-5292. WILLIAMS *v.* PEPSI-COLA BOTTLING CO. C. A. 8th Cir. Certiorari denied.

No. 83-5294. FIELDS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 83-5295. BILLIOT ET AL. *v.* DUNCAN CREW BOAT RENTALS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 705 F. 2d 448.

No. 83-5299. FLORES ET AL. *v.* ARANGUREN. Dist. Ct. Union County, N. J. Certiorari denied.

No. 83-5301. DUGAR *v.* ABRAMS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1436.

No. 83-5315. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 708 F. 2d 606.

No. 83-5318. EHNES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 83-5321. MAXCY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 710 F. 2d 838.

No. 83-5323. CROUCH *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 714 F. 2d 139.

No. 83-5325. BAXTER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 83-5327. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 711 F. 2d 1052.

No. 83-5328. FRANKEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 714 F. 2d 155.

No. 83-5331. CASCANTE-BERNITTA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 711 F. 2d 36.

No. 83-5333. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 714 F. 2d 134.

No. 83-5337. MUHAMMAD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 716 F. 2d 893.

No. 83-5345. SHACKELFORD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 709 F. 2d 911.

No. 83-5353. PATEL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 716 F. 2d 905.

No. 83-5355. MINYE *v.* UNIVERSITY OF MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1505.

No. 83-5356. MOORE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 83-5359. D'ALLEMAN, AKA MURCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 712 F. 2d 100.

No. 83-5372. MALLOY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 83-5373. MARTIN ET AL. *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 83-5380. SMITH *v.* LUCAS, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 83-5381. VAN ALMEN *v.* MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 714 F. 2d 143.

No. 83-5407. DEVINCENT *v.* VERDEYEN, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 714 F. 2d 129.

No. 83-5412. CULVER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 710 F. 2d 1035.

No. 83-5414. JOHNSON *v.* NORMAN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 701 F. 2d 946.

No. 83-5416. JOHNSON *v.* ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. C. A. 3d Cir. Certiorari denied.

No. 83-5417. WARREN *v.* TAMPA, FLORIDA, POLICE DEPARTMENT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1512.

No. 82-1390. ASHLEY ET AL. *v.* CITY OF JACKSON, MISSISSIPPI, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 687 F. 2d 66.

JUSTICE REHNQUIST, with whom JUSTICE BRENNAN joins, dissenting.

This case presents the question whether a victim of alleged discrimination may have his right to sue totally extinguished by a prior suit to which he was not a party and in which a consent decree was entered before his cause of action even accrued. Because I think the Court of Appeals for the Fifth Circuit erred in holding that a district court cannot entertain a suit challenging practices allegedly mandated or permitted by a prior consent decree, I dissent from the denial of certiorari.

In March 1974, consent decrees were entered in two suits alleging race discrimination in the city of Jackson's hiring and promoting practices in its Police Department. *United States* v. *City of Jackson*, Civil Action No. J-74-66(N) (SD Miss.); *Corley* v. *Jackson Police Dept.*, Civil Action No. 73J-4(C) (SD Miss.). As described by the District Court in this case:

> "The consent decree entered in *United States of America* v. *City of Jackson* required, *inter alia*, that the City of Jackson adopt and seek to achieve a goal for hiring blacks for one-half of all vacancies in all job classifications, subject to the availability of qualified applicants, until such time as the proportion of blacks to whites in each such classification equalled the proportion of blacks to whites in the working age population of the City of Jackson. The *Corley* v. *Jackson Police Department* consent decree incorporated by reference the *United States of America* v. *City of Jackson* decree and further provided that the Jackson Police Department establish separate promotion eligibility lists for white and black employees and that it make future promotions, subject to the availability of qualified black candidates, alternately from each such list in a one-to-one ratio until the proportion of black persons in supervisory positions and in the ranks above patrolman substantially equalled the proportion of blacks to whites in the working age population of the City of Jackson." App. to Pet. for Cert. 13A.

In 1976 and 1978, petitioners, who are white, filed two suits against the city of Jackson alleging that the city had discriminated against them in the Police Department by hiring or promoting less qualified blacks solely on the basis of their race. In substance, the complaints alleged that the "goals" established in the prior consent decrees were being treated as strict quotas by the city, and that blacks were being hired and promoted over whites without regard to relative qualifications. See First Amended and Supplemental Complaint in Civil Action No. J76–70(R) (SD Miss.), pp. 36–38; Complaint in Civil Action No. J78–0218(C) (SD Miss.), pp. 20–22. Petitioners contended that the challenged practices were not required by the consent decrees or, in the alternative, that the consent decrees were themselves illegal. As a third option, assuming respondents' practices under the consent decrees were necessary to remedy the effects of the city's past racial discrimination, petitioners claimed that they themselves were now victims of that prior discrimination and, as such, were entitled to compensation.

Both suits were brought only after timely charges of discrimination had been filed with the Equal Employment Opportunity Commission (EEOC), and statutory notices of the right to sue had been received. Jurisdiction of the District Court was invoked under the Fifth and Fourteenth Amendments to the Constitution, under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–5, and under various other provisions of federal law. The court consolidated the two actions.

Petitioners also filed motions for leave to intervene in the consent decree suits in order to challenge those decrees on their face. The United States opposed the motions on the grounds, among others, that they were untimely and asserted interests already adequately represented by the defendant city. The motions to intervene were denied. No appeal was taken.

Following a hearing, the District Court dismissed the consolidated suits for lack of subject-matter jurisdiction. The court determined that "[t]he practices complained of are the result of consent decrees which were entered" in the prior cases, App. to Pet. for Cert. 12a, and, thus, that the suits constitute an impermissible collateral attack on the consent decrees over which a different court has continuing jurisdiction. The dismissal was affirmed on the same grounds by the Fifth Circuit, and this petition followed.

I find myself at a loss to understand the origins of the doctrine of "collateral attack" employed by the lower courts in this case to preclude a suit brought by parties who had no connection with the prior litigation. Their cause of action did not even accrue until at least a year after the entry of the consent decrees. And their attempt to intervene in those suits, more than three years after entry of the consent decrees, was denied as untimely.

It is a fundamental premise of preclusion law that nonparties to a prior action are not bound by the judgment. *Sea-Land Services, Inc.* v. *Gaudet*, 414 U. S. 573, 593 (1974); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 110 (1969). This rule can be traced to an opinion of Chief Justice Marshall in *Davis* v. *Wood*, 1 Wheat. 6, 8–9 (1816); it is part of our "deep-rooted historic tradition that everyone should have his own day in court." 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §4449, p. 417 (1981). Only a few Terms ago, we had occasion to stress that "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party nor a privy and therefore has never had an opportunity to be heard." *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322, 327, n. 7 (1979).

This principle should apply with all the more force to a consent decree, which is little more than a contract between the parties, formalized by the signature of a judge. The central feature of any consent decree is that it is not an adjudication on the merits. The decree may be scrutinized by the judge for fairness prior to his approval, but there is no contest or decision on the merits of the issues underlying the lawsuit. Such a decree binds the signatories, but cannot be used as a shield against all future suits by nonparties seeking to challenge conduct that may or may not be governed by the decree.

Nonparties have an independent right to an adjudication of their claim that a defendant's conduct is unlawful. Suppose, for example, that the Government sues a private corporation for alleged violations of the antitrust laws and then enters into a consent decree. Surely, the existence of that decree does not preclude a future suit by another corporation alleging that the defendant company's conduct, even if authorized by the decree, constitutes an antitrust violation. The nonparty has an independent right to bring his own private antitrust action for treble damages or injunctive relief. See 2 P. Areeda & D. Turner, Antitrust Law ¶330, p. 143 (1978). Similarly, if an action alleging unconstitutional prison conditions results in a consent decree, a prisoner subsequently harmed by prison conditions is not precluded from bringing suit on the mere plea that the conditions are in accordance with the consent decree. Such compliance might be relevant to a defense of good-faith immunity, see Pet. for Cert. in *Bennett* v. *Williams*, O. T. 1982, No. 82–1704, but it would not suffice to block the suit altogether.

In litigation under Title VII of the Civil Rights Act of 1964 we have constantly stressed the importance of individual enforcement actions, and have shown great reluctance to find such actions precluded. Thus, in *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974), we held that an individual does not forfeit his private cause of action if he first pursues his grievance under the nondiscrimination clause of a collective-bargaining agreement.

> "Title VII . . . specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit. In the present case, these prerequisites were met when petitioner (1) filed timely a charge of employment discrimination with the Commission, and (2) received and acted upon the Commission's statutory notice of the right to sue . . . . There is no suggestion in the statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction." *Id.*, at 47.

In this case, petitioners have satisfied the same prerequisites, and "[t]here is no suggestion in the statutory scheme that a prior [consent decree to which petitioners were not parties] either forecloses an individual's right to sue or divests federal courts of jurisdiction." *Ibid.*

In *General Telephone Co.* v. *EEOC*, 446 U. S. 318, 332 (1980), we held that the EEOC may seek classwide relief under Title VII without being certified as the class representative under Rule 23 of the Federal Rules of Civil Procedure, even though we recognized that a judgment so obtained would not "be binding upon all individuals with similar grievances in the class or subclasses that might be certified."

> "In light of the 'general intent to accord parallel or overlapping remedies against discrimination,' . . . we are unconvinced that it would be consistent with the remedial purpose of the statutes to bind all 'class' members with discrimination grievances against an employer by the relief obtained under an EEOC judgment or settlement against the employer. This is especially true given the possible differences between the

> public and private interests involved." *Id.*, at 333 (citing *Alexander*, *supra*, at 47).

We did acknowledge in that case that "where the EEOC has prevailed in its action, the court may reasonably require any individual *who claims under its judgment* to relinguish his right to bring a separate private action." 446 U. S., at 333 (emphasis added). But we were unwilling to bind a class member to a prior judgment when that class member decides to forgo the available class relief because he thinks he can obtain better relief in a private action. It certainly seems to follow that we would not preclude someone who was not a party to the prior action from bringing a private enforcement suit.

Finally, just last Term, in *W. R. Grace & Co.* v. *Rubber Workers*, 461 U. S. 757 (1983), we held that a union, which declined to participate in conciliation between the EEOC and a private corporation, could subsequently challenge layoffs made pursuant to the conciliation agreement as in violation of the seniority provisions of its collective-bargaining agreement with the corporation. The unanimous Court was unmoved by the Company's claim that such suits would subject it to conflicting obligations. "The dilemma," we stressed, "was of the Company's own making." *Id.*, at 767. The Company was attempting, by hiding behind the conciliation agreement, "to shift the loss to its male employees, who shared no responsibility for the sex discrimination." *Id.*, at 770.

In sum, I see no justification, either in general principles of preclusion or the particular policies implicated in Title VII suits, for the District Court's refusal to take jurisdiction over this case. Accordingly, I would grant certiorari to review the judgment of the Court of Appeals for the Fifth Circuit.

No. 82–1633. HOSPITAL BUILDING CO. *v.* TRUSTEES OF REX HOSPITAL ET AL. C. A. 4th Cir. Motion of Federation of American Hospitals for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE BRENNAN and JUSTICE WHITE would grant certiorari. Reported below: 691 F. 2d 678.

No. 82–6498. BANKS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 643 S. W. 2d 129.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the judgment of the Texas Court of Criminal Appeals insofar as it left undisturbed the death sentence imposed in this case. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). However, even if I believed that the death penalty could be imposed under certain circumstances, I would grant certiorari and vacate the death sentence imposed here because the holding below is inconsistent with this Court's decision in *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968).

In *Witherspoon* v. *Illinois*, this Court held that in a case in which the State seeks the death penalty, members of the venire cannot be excluded for cause simply because they voice general objections to the death penalty or express moral or religious scruples against its infliction. The *only* members of the venire who can properly be excluded for cause based upon their attitude toward the death penalty are those who make "unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt.*" *Id.*, at 522, n. 21 (emphasis in original). This Court has noted that the logic of *Witherspoon* would invalidate the exclusion for cause of members of a venire who indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. *Ibid.* This Court has also noted that the logic of *Witherspoon* would invalidate the exclusion for cause of prospective jurors in the penalty phase of a capital trial simply because such jurors aver frankly that while they will honestly find facts and answer interrogatories based on their findings, the prospect of the death penalty may affect their honest judgment of the facts or what they may deem to be a reasonable doubt. *Adams* v. *Texas*, 448 U. S. 38, 50 (1980).

At petitioner's trial, the judge excluded several members of the venire on the ground that their opposition to the death penalty was so irrevocable, automatic, and unbending that they could properly be excused under the *Witherspoon* standard. The record indicates, however, that the trial court and the Texas Court of Criminal Appeals, which affirmed the trial court's imposition of the death penalty, committed clear error in the application of the *Witherspoon* standard.

The Texas Court of Criminal Appeals justified the exclusion of one prospective juror by reference to a single exchange between this juror and the prosecuting attorney:

> "'Q. Is this feeling on your part so firm that you would automatically vote against the death penalty, regardless of what the facts of the case might be?
>
> "'A. Yes, sir.'" *Banks* v. *State*, 643 S. W. 2d 129, 133 (1982).

This one exchange, however, is part of a complicated colloquy the ambiguous character of which is hidden by the Texas court's selective quotation. Certain responses of the potential juror in question indicate that she was apprehensive about the prospect of serving on a jury in a capital case and was, in general, strongly opposed to capital punishment. Other responses indicate, however, that this juror was not so unalterably opposed to the death penalty that she would either automatically vote against the imposition of capital punishment without regard to the evidence developed at trial or allow her general attitude toward the death penalty to prevent her from making an impartial decision as to the defendant's guilt.* For example, the excluded member of the venire stated the following in a colloquy with the petitioner's attorney:

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*Under Texas law, upon a finding that a defendant is guilty of a capital offense, the court conducts a separate sentencing procedure to determine whether the defendant shall be sentenced to death or to life imprisonment. At this proceeding, the State and the defendant are permitted to present evidence in support of arguments for and against a sentence of death. At the conclusion of these presentations, the court submits to the jury three questions: (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased. If the jury finds that the State has proved beyond a reasonable doubt that the answer to each of

> "Q. [L]et me ask you if selected as a juror, would you follow the court's instructions and answer the questions from the evidence that you heard?
>
> "A. I sure would, to the best of my ability.
>
> "Q. All right, and then you would let the law take its course. Then the Judge and his job come into play after you answer questions. Would you do that.
>
> "A. Right; I sure would.
>
> "Q. All right, and regardless of the death penalty or life sentence, you would answer—you would follow the Judge's instructions to you, would you not?
>
> "A. Well, I would feel like I had to, you know.
>
> "Q. All right, and you would answer any questions asked of you from the evidence that you heard in this trial. Would you do that?
>
> "A. Yes, sir.
>
> "Q. I submit, Your Honor, she is qualified." Pet. for Cert. 4–5.

Indeed, the question and answer sequence immediately prior to this potential juror's exclusion by the trial judge shows that she expressed a positive conviction that she was willing to set aside her personal antipathy toward capital punishment and find facts solely on the basis of evidence presented at trial.

> "'Q. Mrs. Rogers, being a conscientious citizen of our county, you would, if chosen as a juror in this case or any case follow the judge's instructions, and you would answer any questions that the judge gives you from the evidence that you heard in the courtroom, wouldn't you?
>
> "'A. I certainly would.'" 643 S. W. 2d, at 135.

These statements clearly indicate that the trial court plainly erred in excluding this potential juror. If a member of the venire is mistakenly excluded, any subsequently imposed death sentence

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the three questions is "yes," the court imposes the death sentence. If the jury finds that the answer to any question is "no," the court imposes a sentence of life imprisonment. See Tex. Code Crim. Proc. Ann., Art. 37.071 (Vernon 1981 and Supp. 1982–1983).

cannot be allowed to stand. See, *e. g., Davis* v. *Georgia* 429 U. S. 122 (1976) *(per curiam)*. This Court should review this case in order to enforce the standards established by *Witherspoon* and *Adams*. I therefore dissent from the denial of certiorari.

No. 82–6973. LINDSEY *v.* LOUISIANA. Sup. Ct. La.;
No. 82–6979. LARETTE *v.* MISSOURI. Sup. Ct. Mo.;
No. 83–5077. SMITH *v.* MISSOURI. Sup. Ct. Mo.;
No. 83–5124. HOPKINSON *v.* WYOMING. Sup. Ct. Wyo.;
No. 83–5146. CRAIG ET AL. *v.* NORTH CAROLINA. Sup. Ct. N. C.; and
No. 83–5366. JAMES *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: No. 82–6973, 428 So. 2d 420; No. 82–6979, 648 S. W. 2d 96; No. 83–5077, 649 S. W. 2d 417; No. 83–5124, 664 P. 2d 43; No. 83–5146, 308 N. C. 446, 302 S. E. 2d 740; No. 83–5366, 431 So. 2d 399.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 82–7013. SMITH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 714 F. 2d 145.

No. 83–222. BORMAN'S INC. *v.* ALLIED SUPERMARKETS, INC. C. A. 6th Cir. Motion of Creditors' Committee of Allied Supermarkets, Inc., for leave to intervene as a party respondent denied. Alternative request to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 706 F. 2d 187.

No. 83–308. KELLY *v.* UNITED STATES. C. A. D. C. Cir. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 228 U. S. App. D. C. 55, 707 F. 2d 1460.

No. 83–5231. DUCKETT *v.* RAINES, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 709 F. 2d 1515.

Rehearing Denied

No. 82-1398. M/V POLLUX ET AL. *v.* GOODPASTURE, INC., 460 U. S. 1084. Petition for rehearing denied.

No. 81-523. CONTAINER CORPORATION OF AMERICA *v.* FRANCHISE TAX BOARD, 463 U. S. 159. Petition for rehearing denied. JUSTICE STEVENS took no part in the consideration or decision of this petition.

OCTOBER 13, 1983

Dismissal Under Rule 53

No. 82-1959. ARNOLD INDUSTRIES, INC., ET AL. *v.* STICKLER. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 53.

OCTOBER 17, 1983

Dismissal Under Rule 53

No. 83-468. BURLINGTON NORTHERN RAILROAD CO. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 227 U. S. App. D. C. 164, 704 F. 2d 1293.

Affirmed on Appeal

No. 82-1493. HEALY ET AL. *v.* UNITED STATES BREWERS ASSN., INC., ET AL. Affirmed on appeal from C. A. 2d Cir. JUSTICE WHITE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR would note probable jurisdiction and set case for oral argument. JUSTICE POWELL took no part in the consideration or decision of this case. Reported below: 692 F. 2d 275.

Appeals Dismissed

No. 82-6798. AUCLAIR *v.* WYOMING. Appeal from Sup. Ct. Wyo. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 660 P. 2d 1156.

No. 83-292. CLOONEY *v.* TOWN OF HARRISVILLE. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83-302. AVEDISIAN *v.* MAY ET AL. Appeal from C. A. 4th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 707 F. 2d 504.

No. 83-341. PEARSON *v.* OHIO. Appeal from Ct. App. Ohio, Cuyahoga County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83-374. LOGAN *v.* SUPREME COURT OF IOWA ET AL. Appeal from Sup. Ct. Iowa dismissed for want of substantial federal question.

No. 83-5320. FULLMER *v.* UTAH. Appeal from Sup. Ct. Utah dismissed for want of substantial federal question. Reported below: 665 P. 2d 1280.

Miscellaneous Orders

No. D-332. IN RE DISBARMENT OF PARSONS. Disbarment entered. [For earlier order herein, see 460 U. S. 1078.]

No. D-333. IN RE DISBARMENT OF BAXTER. Disbarment entered. [For earlier order herein, see 461 U. S. 902.]

No. D-335. IN RE DISBARMENT OF HUBER. Disbarment entered. [For earlier order herein, see 461 U. S. 902.]

No. D-336. IN RE DISBARMENT OF MCLEAN. Disbarment entered. [For earlier order herein, see 461 U. S. 902.]

No. D-337. IN RE DISBARMENT OF VANDOREN. Disbarment entered. [For earlier order herein, see 461 U. S. 903.]

No. D-338. IN RE DISBARMENT OF COLLINS. Disbarment entered. [For earlier order herein, see 461 U. S. 922.]

No. D-340. IN RE DISBARMENT OF LONG. Disbarment entered. [For earlier order herein, see 461 U. S. 922.]

No. D-341. IN RE DISBARMENT OF SCACCHETTI. Disbarment entered. [For earlier order herein, see 461 U. S. 940.]

No. D-342. IN RE DISBARMENT OF BAKER. Disbarment entered. [For earlier order herein, see 461 U. S. 941.]

No. D-344. IN RE DISBARMENT OF STROH. Disbarment entered. [For earlier order herein, see 461 U. S. 941.]

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No. D–346. In re Disbarment of Hollingsworth. Disbarment entered. [For earlier order herein, see 461 U. S. 953.]

No. D–347. In re Disbarment of Rocap. Disbarment entered. [For earlier order herein, see 461 U. S. 953.]

No. D–365. In re Disbarment of Rayburn. It is ordered that Harry Newton Rayburn, Jr., of Jackson, Miss., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–366. In re Disbarment of McMurray. It is ordered that Joseph C. McMurray, of Juneau, Alaska, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–367. In re Disbarment of Treuber. It is ordered that William F. Treuber, of Smithtown, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–368. In re Disbarment of Glasschroeder. It is ordered that Allan F. Glasschroeder, of Milwaukee, Wis., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–369. In re Disbarment of Cantagallo. It is ordered that Phillip John Cantagallo, of Ashtabula, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–370. In re Disbarment of Goldfarb. It is ordered that Carl Goldfarb, of Charlotte, N. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–371. In re Disbarment of Jones. It is ordered that Harold B. Jones, of Midland, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–372. In re Disbarment of Chagra. It is ordered that Joseph Salim Chagra, of El Paso, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 82–818. National Labor Relations Board *v.* Bildisco & Bildisco, Debtor-In-Possession, et al.; and

No. 82–852. Local 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America *v.* National Labor Relations Board et al. C. A. 3d Cir. [Certiorari granted, 459 U. S. 1145.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a supplemental brief as *amicus curiae* denied.

No. 82–945. Sure-Tan, Inc., et al. *v.* National Labor Relations Board. C. A. 7th Cir. [Certiorari granted, 460 U. S. 1021.] Motion of Mexican American Legal Defense and Educational Fund, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 83–507. Carpenters Pension Trust for Southern California *v.* Shelter Framing Corp. et al. C. A. 9th Cir. Motion of petitioner to defer consideration in Nos. 83–245 and 83–291, *infra*, or in the alternative, to expedite consideration of the petition for writ of certiorari in No. 83–507 denied.

Probable Jurisdiction Noted

No. 82–1577. Michigan Canners & Freezers Assn., Inc., et al. *v.* Agricultural Marketing and Bargaining Board et al. Appeal from Sup. Ct. Mich. Probable jurisdiction noted. Reported below: 416 Mich. 706, 332 N. W. 2d 134.

No. 83–245. Pension Benefit Guaranty Corporation *v.* R. A. Gray & Co.; and

No. 83–291. Oregon-Washington Carpenters-Employers Pension Trust Fund *v.* R. A. Gray & Co. Appeals from C. A. 9th Cir. Motion of G & R Roofing Co. for leave to file a brief as *amicus curiae* in No. 83–245 granted. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 705 F. 2d 1502.

Certiorari Granted

No. 82–1734. PALMORE *v.* SIDOTI. Dist. Ct. App. Fla., 2d Dist. Certiorari granted. Reported below: 426 So. 2d 34.

No. 82–1994. KIRBY FOREST INDUSTRIES, INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. Reported below: 696 F. 2d 351.

No. 82–2042. WESTINGHOUSE ELECTRIC CORP. *v.* VAUGHN ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 702 F. 2d 137.

No. 82–2056. ESCONDIDO MUTUAL WATER CO. ET AL. *v.* LA JOLLA BAND OF MISSION INDIANS ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 692 F. 2d 1223 and 701 F. 2d 826.

No. 83–271. NATIONAL COLLEGIATE ATHLETIC ASSN. *v.* BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA ET AL. C. A. 10th Cir. Certiorari granted. Reported below: 707 F. 2d 1147.

No. 83–95. PATTON ET AL. *v.* YOUNT. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 710 F. 2d 956.

No. 83–128. UNITED STATES *v.* GOUVEIA ET AL. C. A. 9th Cir. Motions of respondents Robert Ramirez, Philip Segura, Robert E. Mills, and Raymond Pierce for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 704 F. 2d 1116.

No. 82–6840. JAMES *v.* KENTUCKY. Sup. Ct. Ky. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 647 S. W. 2d 794.

Certiorari Denied. (See also Nos. 82–6798, 83–292, 83–302, and 83–341, *supra.*)

No. 82–1678. FULTON ET AL. *v.* PLUMBERS & STEAMFITTERS, LOCAL 598, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 695 F. 2d 402.

No. 82–1911. GIBSON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 82–1976. ALABAMA *v.* MCCRARY. Ct. Crim. App. Ala. Certiorari denied. Reported below: 429 So. 2d 1121.

No. 82-2019. WEECH ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 701 F. 2d 188.

No. 82-2100. BEHREND ET AL. *v.* GOVERNMENT NATIONAL MORTGAGE ASSN. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 707 F. 2d 1399.

No. 82-6789. JONES *v.* JAGO, SUPERINTENDENT, LONDON CORRECTIONAL INSTITUTE. C. A. 6th Cir. Certiorari denied. Reported below: 701 F. 2d 45.

No. 82-6797. BLOCH *v.* AMBACH, COMMISSIONER OF EDUCATION OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 1443.

No. 82-6811. PIROLLI *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 427 So. 2d 755.

No. 82-6903. LATNER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 702 F. 2d 947.

No. 82-6919. WAYNE *v.* RAINES, ADMINISTRATOR, ARIZONA CORRECTIONAL TRAINING CENTER-TUCSON, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 690 F. 2d 685.

No. 82-6920. SNEAD *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 82-6975. RODRIGUEZ *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 111 Wis. 2d 701, 332 N. W. 2d 312.

No. 83-86. S. E. NICHOLS OF OHIO, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 704 F. 2d 921.

No. 83-114. GALVAN ET AL. *v.* UNITED STATES; and
No. 83-123. JAMARDO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 702 F. 2d 1315.

No. 83-120. NEW YORK RACING ASSN., INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 708 F. 2d 46.

No. 83-129. HOLLOWAY ET AL. *v.* VALLEY ET AL.; and
No. 83-289. RAPIDES PARISH SCHOOL BOARD ET AL. *v.* VALLEY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 702 F. 2d 1221.

No. 82–2017. MARTIN *v.* MITCHELL, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 707 F. 2d 508.

No. 83–132. STRUTHERS PATENT CORP. ET AL. *v.* NESTLE CO., INC. C. A. 3d Cir. Certiorari denied. Reported below: 709 F. 2d 1495.

No. 83–136. LAKE ERIE ALLIANCE FOR THE PROTECTION OF THE COASTAL CORRIDOR, INC., ET AL. *v.* UNITED STATES ARMY CORPS OF ENGINEERS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 707 F. 2d 1392.

No. 83–137. BERLITZ SCHOOLS OF LANGUAGES OF AMERICA, INC. *v.* BARTELT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 1003.

No. 83–195. DELTA FARMS RECLAMATION DISTRICT NO. 2028 *v.* SUPERIOR COURT OF THE COUNTY OF SAN JOAQUIN (FERNANDEZ ET AL., REAL PARTIES IN INTEREST). Sup. Ct. Cal. Certiorari denied. Reported below: 33 Cal. 3d 699, 660 P. 2d 1168.

No. 83–201. WEISS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 714 F. 2d 126.

No. 83–213. NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN, INC., ET AL. *v.* CAREY, GOVERNOR OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 706 F. 2d 956.

No. 83–225. VAN EMMERIK *v.* MONTANA DAKOTA UTILITIES CO. ET AL. Sup. Ct. S. D. Certiorari denied. Reported below: 332 N. W. 2d 279.

No. 83–255. BENSON ET AL. *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 389 Mass. 473, 451 N. E. 2d 118.

No. 83–259. EASTERN AIR LINES, INC. *v.* ATLANTIC RICHFIELD CO. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 712 F. 2d 1402.

No. 83–265. CHAFFEE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 83–273. GALARDO, DBA TERM CON ELECTRONICS, ET AL. *v.* AMP INC. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 709 F. 2d 1515.

No. 83-285. KELLY *v.* UNITED STATES; and
No. 83-5296. KELLY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 708 F. 2d 121.

No. 83-288. BLANCK *v.* MCKEEN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 707 F. 2d 817.

No. 83-290. IVY *v.* NATCHITOCHES PARISH SCHOOL BOARD ET AL. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 428 So. 2d 1332.

No. 83-294. LINDSEY *v.* KELLY, SUPERINTENDENT OF THE CHICAGO PARK DISTRICT, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 714 F. 2d 149.

No. 83-301. ALASKA LUMBER & PULP CO., INC. *v.* REID BROTHERS LOGGING CO.; and
No. 83-307. KETCHIKAN PULP CO. *v.* REID BROTHERS LOGGING CO. C. A. 9th Cir. Certiorari denied. Reported below: 699 F. 2d 1292.

No. 83-339. PROVODA *v.* BELEN BOARD OF EDUCATION, DBA BELEN CONSOLIDATED SCHOOLS, ET AL. C. A. 10th Cir. Certiorari denied.

No. 83-363. CONNECTICUT *v.* UBALDI. Sup. Ct. Conn. Certiorari denied. Reported below: 190 Conn. 559, 462 A. 2d 1001.

No. 83-376. YALKOWSKY ET AL. *v.* SHEDLER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1441.

No. 83-433. YALKOWSKY *v.* NEALE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1441.

No. 83-470. RADUE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 707 F. 2d 493.

No. 83-471. CRUZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 709 F. 2d 713.

No. 83-481. THOMPSON *v.* HEDRICK ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 711 F. 2d 1059.

No. 83-5026. JACKSON *v.* BUTTERWORTH, SHERIFF OF BROWARD COUNTY, FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 83-5028. Leycock *v.* Government of the Virgin Islands. C. A. 3d Cir. Certiorari denied. Reported below: 709 F. 2d 1491.

No. 83-5054. Maxcy *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 710 F. 2d 838.

No. 83-5060. Abbott *v.* Adan, Individually, and as Administratrix of the Estate of Adan. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 93 App. Div. 2d 1007, 462 N. Y. S. 2d 734.

No. 83-5062. Johnson *v.* Hubbard et al. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 286.

No. 83-5079. Henry *v.* Ohio. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 83-5149. Hagler *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 709 F. 2d 578.

No. 83-5160. Zboinski *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 111 Ill. App. 3d 1162, 455 N. E. 2d 574.

No. 83-5163. Weeks *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 702 F. 2d 1341.

No. 83-5169. Atencia *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 113 Ill. App. 3d 247, 446 N. E. 2d 1243.

No. 83-5170. April *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 112 Ill. App. 3d 1158, 456 N. E. 2d 370.

No. 83-5173. Tejeda-Gallegos *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 711 F. 2d 1067.

No. 83-5181. Booker *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 706 F. 2d 860.

No. 83-5206. Ljubas *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 706 F. 2d 42.

No. 83-5300. PARISIE *v.* GREER, WARDEN, MENARD CORRECTIONAL CENTER. C. A. 7th Cir. Certiorari denied. Reported below: 705 F. 2d 882.

No. 83-5303. HARVEY *v.* PINCUS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 716 F. 2d 890.

No. 83-5314. THOMAS *v.* COX, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 708 F. 2d 132.

No. 83-5319. EGGER *v.* PHILLIPS. C. A. 7th Cir. Certiorari denied. Reported below: 710 F. 2d 292.

No. 83-5346. KODADEK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 668.

No. 83-5350. SMITH *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 711 F. 2d 1051.

No. 83-5362. BONNER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 712 F. 2d 1418.

No. 83-5378. WALKER *v.* DUGGER, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 436 So. 2d 101.

No. 83-5391. HEISE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 449.

No. 83-5398. FLEMMINGS *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 83-5421. FOWLER *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 436 So. 2d 28.

No. 83-5423. GREER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 83-5427. BERICK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 710 F. 2d 1035.

No. 83-5435. HERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 697 F. 2d 1093.

No. 83-5462. HARDIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 710 F. 2d 1231.

No. 82–1718. RANDALL BOOK CORP. *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 53 Md. App. 30, 452 A. 2d 187.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Petitioner was charged with violating Md. Ann. Code, Art. 27, § 416D (1982), which makes a person or firm guilty of a misdemeanor "if it knowingly displays for advertising purposes any picture, photograph, drawing, sculpture or other visual representation or image of a person or portion of the human body that depicts sadomasochistic abuse, sexual conduct or sexual excitement, or any verbal description or narrative account of these activities or items." The Circuit Court for Baltimore County dismissed the charges, concluding that the statute was unconstitutionally vague and overbroad.

On the State's appeal, the Maryland Court of Special Appeals reversed. 53 Md. App. 30, 452 A. 2d 187 (1982). The court, relying on *Smiley* v. *State*, 294 Md. 461, 450 A. 2d 909 (1982), concluded that the statute is constitutional and remanded to the trial court for further proceedings. In *Smiley*, the Maryland Court of Appeals construed the statute to prohibit only "obscene material," which this Court has held is unprotected by the First Amendment. See *Miller* v. *California*, 413 U. S. 15, 23 (1973).

In my view, the statute is unconstitutional on its face, notwithstanding the state court's limiting construction. I continue to believe that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). See also *New York* v. *Ferber*, 458 U. S. 747, 775–777 (1982) (BRENNAN, J., concurring in judgment).

Since a criminal trial of petitioner under this statute will in my view violate the Constitution of the United States, it is clear that "identifiable . . . constitutional polic[y]" will be "undermined by the continuation of the litigation in the state courts." See *Flynt* v. *Ohio*, 451 U. S. 619, 623 (1981) (Stewart, J., dissenting); *id.*, at 623–624 (STEVENS, J., dissenting). Accordingly, the decision below is final within the meaning of 28 U. S. C. § 1257, and we have jurisdiction to review it. *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 483 (1975).

I would therefore grant certiorari, vacate the judgment of the Court of Special Appeals, and reinstate the dismissal of the indictment.

No. 82–2091. MOODY *v.* MEYERS ET AL. C. A. 5th Cir. Motions of Washington Legal Foundation, American Conservative Union et al., and Citizens Economic Foundation for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 693 F. 2d 1196.

No. 82–6913. JONES *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 94 Ill. 2d 275, 447 N. E. 2d 161.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the judgment of the Supreme Court of Illinois insofar as it left undisturbed the death sentence imposed in this case. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). However, even if I believed that the death penalty could be imposed constitutionally under certain circumstances, I would grant certiorari and vacate the death sentence imposed here.

Given the wording of the Illinois death penalty statute and the trial court's instructions in this case, I am not convinced that petitioner's sentencing jury balanced mitigating factors and aggravating circumstances in the manner required by this Court in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982). Under the Illinois statute, once a sentencing jury finds a statutorily defined aggravating factor to exist, the jury proceeds to consider aggravating and mitigating factors. "If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death." Ill. Rev. Stat., ch. 38, ¶9-1(g) (Supp. 1982). At the sentencing trial in this case, the trial judge instructed the jury on how to evaluate mitigating evidence: "'[Y]ou go out and determine whether or not this evidence has taken away the [aggravating] factors, mitigated the factors so that you might say no, we don't want to vote for the death penalty.'" See *People* v. *Jones*, 94 Ill. 2d 275, 302, 447 N. E. 2d 161, 174 (1982) (Simon, J., concurring in part and dissenting in part). Notwithstanding other portions of the trial court's instructions, this instruction coupled with the Illinois statute's ambiguous reference to "preclud[ing] the imposition of the death sentence" may well have led the sentencing jury to conduct its deliberation under the assumption that petitioner had the burden of proving that the death penalty was inappropriate in his particular case. Since I do not understand this Court's precedents to permit the placing of such a burden on a defendant, I would grant the petition.

No. 83-284. MOON ET AL. *v.* HYOSUNG AMERICA, INC. C. A. 9th Cir. Motion of respondent for damages denied. Certiorari denied.

No. 83-5053. PETRELLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 707 F. 2d 64.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

Petitioner was admitted to the United States in 1978 and obtained a 1-year trainee visa. Upon expiration of his visa, he failed to depart voluntarily and, after protracted deportation proceedings, was deported to Italy. Approximately one month later, petitioner attempted to cross the border at Highgate Springs, Vt. He was arrested and charged with violating 8 U. S. C. § 1326, which proscribes unauthorized entry or attempted entry into this country by one who "has been arrested and deported or excluded and deported."

Prior to trial, petitioner moved to dismiss the indictment on the ground that the earlier deportation proceedings had denied him due process. The District Court refused to review the earlier proceedings and denied the motion. Petitioner was found guilty by a jury and sentenced to a term of imprisonment of one year, all but 30 days of which was suspended. On appeal, the Court of Appeals for the Second Circuit affirmed petitioner's conviction, holding that Congress did not intend to allow collateral attacks on deportation orders in § 1326 prosecutions. 707 F. 2d 64 (1983).

The question presented in this petition is unresolved. In *United States* v. *Spector*, 343 U. S. 169 (1952), the Court expressly reserved decision on this precise issue because it had not been raised in the proceedings below. Moreover, as the Court of Appeals in this case noted, the Courts of Appeals that have addressed the question of the permissibility of collateral attack are divided. 707 F. 2d., at 65. Arguably supporting petitioner's position that collateral attack is permitted are: *United States* v. *Rangel-Gonzales*, 617 F. 2d 529, 530 (CA9 1980) ("deportations are subject to collateral attack"); *United States* v. *Bowles*, 331 F. 2d 742, 750 (CA3 1964) (deportation order may be attacked on ground that there is "no basis in fact for the Board's conclusion in respect to deportability" or there is "no warrant in law" for issuance of order). Arguably supporting the Government's position that collateral attack is not permitted are: *United States* v. *De La Cruz-Sepulveda*, 656 F. 2d 1129, 1131 (CA5 1981) ("a defendant cannot collaterally attack the original deportation order"); *Arriaga-Ramirez* v. *United States*, 325 F. 2d 857, 859 (CA10 1963) ("a deportation cannot be collaterally attacked in a prosecution under 8 U. S. C. § 1326"). As a further reflection of the uncertainty in this area, both parties to this proceeding rely on *United States* v. *Rosal-Aguilar*, 652 F. 2d 721, 723 (CA7 1981) (agrees that collateral attacks are barred, but accepts the proposition that the Government must prove the underlying deportation to have been "based on a valid legal predicate and obtained according to law").

The issue presented in this case is one of considerable importance to the consistent enforcement of this Nation's immigration laws. Accordingly, I would grant the petition to resolve the issue left open in *United States* v. *Spector*.

No. 83–5209. BOOKER *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.; and

No. 83–5267. SULLIVAN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: No. 83–5209, 703 F. 2d 1251; No. 83–5267, 695 F. 2d 1306.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth

and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

OCTOBER 31, 1983

Appeals Dismissed

No. 82–6768. FINNEY *v.* MICHIGAN DEPARTMENT OF SOCIAL SERVICES. Appeal from Sup. Ct. Mich. dismissed for want of substantial federal question. Reported below: 415 Mich. 512, 330 N. W. 2d 33.

No. 83–140. PITTSBURG & MIDWAY COAL MINING CO. *v.* REVENUE DIVISION, TAXATION AND REVENUE DEPARTMENT OF NEW MEXICO. Appeal from Ct. App. N. M. dismissed for want of substantial federal question. Reported below: 99 N. M. 545, 660 P. 2d 1027.

No. 83–366. PENOBSCOT NATION *v.* STILPHEN, COMMISSIONER, DEPARTMENT OF PUBLIC SAFETY OF MAINE, ET AL. Appeal from Sup. Jud. Ct. Me. dismissed for want of substantial federal question. Reported below: 461 A. 2d 478.

No. 83–333. C.P. CHEMICAL CO., INC. *v.* COMMISSIONER OF PUBLIC HEALTH OF MASSACHUSETTS. Appeal from Sup. Jud. Ct. Mass. Motion of appellant to dispense with printing partial appendix granted. Appeal dismissed for want of substantial federal question. Reported below: 388 Mass. 707, 448 N. E. 2d 367.

No. 83–518. JACQUES ET UX. *v.* UNITED STATES ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83–5322. ELLIOTT *v.* ELLIOTT. Appeal from Sup. Ct. N. M. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83–5375. CHAPMAN *v.* BANK OF THE COMMONWEALTH ET AL. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 711 F. 2d 1055.

No. 83–5431. COJANIS *v.* COJANIS ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated in Part and Remanded

No. 82–6830. SMITH *v.* OKLAHOMA. Ct. Crim. App. Okla. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. The judgment is vacated insofar as it leaves undisturbed the death penalty imposed and the case is remanded for further consideration in light of the position presently asserted by the Attorney General of Oklahoma in his memorandum filed September 14, 1983. Reported below: 659 P. 2d 330.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, concurring in part and dissenting in part.

I concur in the remand of this case to the Court of Criminal Appeals of Oklahoma, but I am neither comfortable nor content with this Court's vacation of only the death penalty. I would vacate petitioner's conviction as well as his sentence and thereby permit the Court of Criminal Appeals to review the case afresh. That court is free, of course, after appropriate consideration and if the circumstances warrant, to reinstate the conviction. I, however, would have the Oklahoma tribunal make that move affirmatively, rather than be tempted (it would be error, in my view) not to act at all because it misperceives an implication in this Court's vacation limited to the death penalty.

I reach this conclusion because the Attorney General of Oklahoma, in his response to the petition for a writ of certiorari, says only:

> "The transcript reveals that the sole evidence which linked the Petitioner to the death of the victim is contained in a statement given by the Petitioner to Sheriff Ingram. The crucial part of this statement appears on pages 137–140 of the trial transcript. According to Sheriff Ingram, the Petitioner advised him that, when he started walking away from the victim's pickup, he observed his co-defendant Goforth, place 'some paper or something' under the front seat of the pickup (Tr. 139). Nowhere is it stated that the Petitioner observed his co-defendant set fire to the pickup.

> "In view of the foregoing, the State concedes that it cannot be said that the Petitioner 'contemplated that life would be taken.' *Enmund* v. *Florida*, [458] U. S. [782, 801] (. . . 1982)."

As I read that concession by the State, it means that there was no intent on petitioner's part to kill and, hence, that he could not be guilty of murder, let alone incur the death penalty.

But if the State's concession is indecisive and its language less than clear—as, evidently, a majority of the Members of this Court feels it to be—it seems to me that we should vacate the judgment entirely anyway, and let the Attorney General then clarify his concession to the Oklahoma Court of Criminal Appeals in language that is plainly understood so that that court may act and proceed accordingly. Surely, it is not for this Court to interpret, in the first instance, the extent of the State's concession and measure its reach so begrudgingly as it does today.

Miscellaneous Orders

No. — – ——. CASTILLO *v.* UNITED STATES. Motion to direct the Clerk to file the petition for writ of certiorari out of time denied.

No. A–187. GLEASON *v.* UNITED STATES. Application for bail, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–242. AUTRY *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Motion to vacate the stay of execution of sentence of death, entered by JUSTICE WHITE on October 5, 1983 [*post*, p. 1301], denied.

No. A–295. COULTER *v.* ALABAMA. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, is granted pending the timely filing and disposition of a petition for writ of certiorari.

No. A–298. EVANS *v.* TEXAS. Application to continue the stay of issuance of the mandate of the Court of Criminal Appeals of Texas, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending the timely filing and disposition of a petition for writ of certiorari.

No. D–348. IN RE DISBARMENT OF DAVIS. Disbarment entered. [For earlier order herein, see 461 U. S. 953.]

No. D–349. IN RE DISBARMENT OF BUTLER. Disbarment entered. [For earlier order herein, see 461 U. S. 954.]

No. D–351. In re Disbarment of Hoff. Disbarment entered. [For earlier order herein, see 462 U. S. 1102.]

No. D–352. In re Disbarment of Rosenberg. Disbarment entered. [For earlier order herein, see 462 U. S. 1102.]

No. D–373. In re Disbarment of Perri. It is ordered that Daniel Christopher Perri, of Pensacola, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–374. In re Disbarment of McGhee. It is ordered that Milton Lorenzo McGhee, of Sacramento, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–375. In re Disbarment of Italiano. It is ordered that Thomas J. Italiano, of Parma, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–376. In re Disbarment of Goldstein. It is ordered that George Edward Goldstein, of Pottstown, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–377. In re Disbarment of Mandel. It is ordered that David J. Mandel, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–378. In re Disbarment of Lorenzo. It is ordered that Samuel Lorenzo, of Sussex, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–379. In re Disbarment of Grossman. It is ordered that Neal L. Grossman, of Columbus, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–380. In re Disbarment of Desmond. It is ordered that Francis Patrick Desmond, of Thornton, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 9, Orig. United States *v.* Louisiana et al. Motion of the Special Master for additional partial payment by Mississippi for services granted, and the Court approves payment of $12,500.00. Justice Marshall took no part in the consideration or decision of this motion. [For earlier order herein, see, *e. g.*, 459 U. S. 963.]

No. 80, Orig. Colorado *v.* New Mexico et al. Motion of New Mexico for leave to file a reply brief granted. Exceptions of New Mexico to the Additional Factual Findings of the Special Master are set for oral argument in due course. [For earlier order herein, see, *e. g.*, 463 U. S. 1204.]

No. 80–1577. City of Mesquite *v.* Aladdin's Castle, Inc., 455 U. S. 283. Motion of appellant to recall the judgment of this Court denied.

No. 82–958. McDonough Power Equipment, Inc. *v.* Greenwood et al. C. A. 10th Cir. [Certiorari granted, 462 U. S. 1130.] Motion of Sheila Brewer for leave to file a brief as *amicus curiae* out of time denied.

No. 82–1005. Chevron U.S.A. Inc. *v.* Natural Resources Defense Council, Inc., et al.;
No. 82–1247. American Iron & Steel Institute et al. *v.* Natural Resources Defense Council, Inc., et al.; and
No. 82–1591. Ruckelshaus, Administrator, Environmental Protection Agency *v.* Natural Resources Defense Council, Inc., et al. C. A. D. C. Cir. [Certiorari granted, 461 U. S. 956.] Motion of United Steelworkers of America, AFL–CIO–CLC, for leave to file a brief as *amicus curiae* granted.

No. 82–1246. Bose Corp. *v.* Consumers Union of United States, Inc. C. A. 1st Cir. [Certiorari granted, 461 U. S. 904.] Motion of Marie Shibuya-Snell, Director of the California Department of Consumer Affairs, for leave to file a brief as *amicus curiae* out of time denied.

No. 82-6758. TURNER *v.* COUNTY OF SISKIYOU ET AL. Ct. App. Cal., 3d App. Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until November 21, 1983, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court. JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS would grant the motion for leave to proceed *in forma pauperis* and would deny the petition for writ of certiorari.

No. 82-6765. UNTERTHINER *v.* DESERT HOSPITAL DISTRICT OF PALM SPRINGS. Sup. Ct. Cal. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until November 21, 1983, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

No. 82-6778. BROWN *v.* HERALD CO., INC., DBA GLOBE DEMOCRAT PUBLISHING CO. C. A. 8th Cir.;

No. 82-6907. ALEXANDER *v.* TEXAS ET AL. Ct. Crim. App. Tex.;

No. 82-6956. CROSS *v.* SECRETARY OF STATE. Appeal from Ct. App. Cal., 3d App. Dist.;

No. 83-5040. ENO ET AL. *v.* UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ET AL. C. A. 1st Cir.;

No. 83-5100. LINFIELD *v.* BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK. C. A. 2d Cir.; and

No. 83-5349. MILLER *v.* PIERCE, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. C. A. 9th Cir. Motions of petitioners and appellant for leave to proceed *in forma pauperis* denied. Petitioners and appellant are allowed until November 21, 1983, within which to pay the docketing fee required by Rule 45(a) and to submit petitions and a jurisdictional statement in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

In each of these cases, the Court has denied petitioner's or appellant's motion to proceed *in forma pauperis* without initially addressing the issue whether the questions presented in the petition for certiorari or jurisdictional statement merit our plenary review—and the Court is apparently announcing today that this will be our practice in the future.[1] At a time when at least some of us proclaim that we are sorely pressed for adequate time to do our work, this treatment is both unfair and wasteful, and I respectfully dissent.

Ordinarily, a $200 filing fee must be paid before a petition for certiorari or a jurisdictional statement, properly conforming to the requirements of this Court's Rule 33, may be filed. This Court's Rule 45. However, 28 U. S. C. § 1915(a) provides that "[a]ny court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor." This Court's Rule 46.1, which implements this statute, provides that "[a] party desiring to proceed in this Court *in forma pauperis* shall file a motion for leave to so proceed, together with his affidavit in the form prescribed in Fed. Rules App. Proc., Form 4 . . . setting forth with particularity facts showing that he comes within the statutory requirements."[2] If the motion is granted, no filing fee is charged, and a single typewritten petition or jurisdictional statement may be filed.

Each year, roughly 1,000 motions supported by affidavit are made for leave to proceed *in forma pauperis*.[3] These motions usually accompany a petition for a writ of certiorari or a jurisdictional statement, and our practice heretofore has almost always been not to pass on the *in forma pauperis* motion but to proceed directly to grant or deny the petition based on the merits of the questions presented in the petition or statement. Yet in the instant cases, each of which presents questions so lacking in merit as to have virtually no chance of receiving a plenary hearing, the Court has chosen instead to focus initially on the affidavits supporting the *in forma pauperis* motions and to deny the motions.

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[1] This new procedure emerged last Term, when in several instances the Court denied parties' motions to proceed *in forma pauperis* because the parties were deemed either not to be sufficiently poor or to have failed to file adequate affidavits.

[2] Rule 46.1 further provides that "if the district court or the court of appeals has appointed counsel under the Criminal Justice Act of 1964, as amended, the party need not file an affidavit."

[3] Approximately 1,000 additional motions are filed in which Rule 46 does not require an affidavit.

This practice simply postpones the determination of the merits of the questions presented until after deficiencies in the *in forma pauperis* motion are corrected or the filing fee is paid. That approach multiplies our work to no purpose.

I cannot concur in this treatment. Not only does the Court fail to provide the parties with any guidance as to how their affidavits may be considered in the future, it also prescribes no standards by which litigants and those screening the motions may determine when an individual is sufficiently poor to warrant a grant of *in forma pauperis* status. The only statement the Court has ever made on this subject is that an affiant must show he is unable to "'pay or give security for the costs . . . and still be able to provide' himself and dependents 'with the necessities of life.'" *Adkins* v. *E. I. DuPont de Nemours & Co.*, 335 U. S. 331, 339 (1948). This is hardly a meaningful standard; it indeed suggests that a wide array of factors must be considered before ruling on a motion.[4]

But, even with an articulated set of standards against which to make decisions, under today's procedure we lose, not gain. Certainly that should be clear to those of us who perceive that we engage in a never-ending struggle to find time needed for important work. The likely result of disposing of cases as the Court does today will be to encourage parties bringing these motions to resubmit their petitions or appeals with a new affidavit they hope will strike a more sympathetic chord—thus increasing the time we must spend to dispose of frivolous cases. Where it is clear that the merits involved are almost certainly insufficient to demand full review (as has been our experience in all but a handful of *in forma pauperis* cases each year) no purpose is served by indulging in that waste. It is important that we try to avoid the waste of the parties' time, but perhaps even more important that this Court's time not be used in this unnecessary exercise. As JUSTICE STEVENS has stated in a similar context, "given the volume of frivolous, illegible, and sometimes unintelligible petitions that are filed in this Court, our work is facilitated by the practice of simply denying certiorari once a determination is made that there is no merit to the petitioner's claim." *Davis* v. *Jacobs*, 454 U. S. 911, 914 (1981) (opinion respecting denial of certiorari). What possible justification can support the scrutiny of 1,000 affidavits in support of *in forma pauperis* motions each year? Except, perhaps, in cases of extreme abuse,[5] where a petition or appeal wholly lacks merit, we surely benefit all concerned by relying on that reason for disposing finally of the case. Our time certainly can be spent in more productive effort than the determination of whether a petitioner or appellant is able to pay $200 plus the cost of printing and still provide himself and his dependents with the necessities of life.

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[4] I note in passing that Form 4 of the Federal Rules of Appellate Procedure does not even call for a description of the debts of the affiant; nor does it call for the affiant's age; nor does it call for an indication of the cost of living in the affiant's place of residence. Hence, I doubt that the Court could successfully develop standards based on the information currently available.

Furthermore, it is no answer that there is a wide range of motions, such as motions for extensions of time, that the Court decides without the aid of explicit standards. Motions to proceed *in forma pauperis* are a special case since they will determine whether an individual gains access to this Court.

JUSTICE STEVENS, dissenting.

Although I agree with JUSTICE BRENNAN that we should simply deny unmeritorious certiorari petitions without scrutinizing the petitioner's right to proceed *in forma pauperis*, I would not *grant* any such petition without making sure that the petitioner is unable to pay the required costs. If such examination disclosed the kind of disrespect for our rules that has motivated the Court's unusual action in these cases, I would deny the petition even if it would otherwise have merited review. That would remove any incentive a petitioner might otherwise have to seek *in forma pauperis* status although ineligible for such status, without requiring the Court to assume the burden of examining every motion for leave to proceed *in forma pauperis*. In borderline cases the petitioner should, of course, be given an opportunity to pay the required costs before final action is taken on his application. I see no purpose, however, in insisting that these petitioners—none of whom is represented by counsel who could advise them that their petitions stand no chance of being granted—pay a fee for the privilege of having their petitions denied.

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[5] See, *e. g.*, *Unterthiner* v. *Desert Hospital District Of Palm Springs*, No. 82-6765 (approximately $1,000,000 net assets, $2,500 salary per month, and four dependents), *ante*, p. 928.

Probable Jurisdiction Noted

No. 83–141. Hawaii Housing Authority et al. *v.* Midkiff et al.;

No. 83–236. Portlock Community Assn. (Maunalua Beach) et al. *v.* Midkiff et al.; and

No. 83–283. Kahala Community Assn., Inc., et al. *v.* Midkiff et al. Appeals from C. A. 9th Cir. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Justice Marshall took no part in the consideration or decision of these cases. Reported below: 702 F. 2d 788.

Certiorari Granted

No. 82–2120. Smith et al. *v.* Robinson, Rhode Island Associate Commissioner of Education, et al. C. A. 1st Cir. Certiorari granted. Reported below: 703 F. 2d 4.

No. 83–173. Wasman *v.* United States. C. A. 11th Cir. Certiorari granted. Reported below: 700 F. 2d 663.

No. 83–371. Federal Communications Commission et al. *v.* ITT World Communications, Inc., et al. C. A. D. C. Cir. Certiorari granted. Reported below: 226 U. S. App. D. C. 67, 699 F. 2d 1219.

No. 83–185. Cooper et al. *v.* Federal Reserve Bank of Richmond. C. A. 4th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 698 F. 2d 633.

Certiorari Denied. (See also Nos. 83–518, 83–5322, 83–5375, and 83–5431, *supra.*)

No. 82–1414. Pratt-Farnsworth, Inc., et al. *v.* Carpenters Local Union No. 1846 of the United Brotherhood of Carpenters & Joiners of America, AFL–CIO, et al. C. A. 5th Cir. Certiorari denied. Reported below: 690 F. 2d 489.

No. 82–1704. Bennett et al. *v.* Williams. C. A. 11th Cir. Certiorari denied. Reported below: 689 F. 2d 1370.

No. 82–1839. Mann, Administrator of the Estate of Mann *v.* Gold et al.; and Mann, Administrator of the Estate of Mann *v.* Canter et al. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 1231.

No. 82–1882. Church of Scientology of Portland et al. *v.* Rudie et al. Ct. App. Ore. Certiorari denied. Reported below: 59 Ore. App. 409, 650 P. 2d 191.

No. 82-1997. Rollins et al. *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 699 F. 2d 530.

No. 82-2003. Licensed Beverage Distributors Assn. *v.* United States; and

No. 82-2013. Texas et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 695 F. 2d 136.

No. 82-2007. Andrew *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 705 F. 2d 468.

No. 82-2088. Equitable Life Assurance Society of the United States *v.* Burns et al. C. A. 2d Cir. Certiorari denied. Reported below: 696 F. 2d 21.

No. 82-2092. Petti et al. *v.* United States; and

No. 83-252. Bartolatta *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 707 F. 2d 520.

No. 82-2095. Gardner et al. *v.* Pan American World Airways, Inc. C. A. 11th Cir. Certiorari denied. Reported below: 700 F. 2d 695.

No. 82-2139. Armstrong *v.* Armstrong. C. A. 9th Cir. Certiorari denied. Reported below: 696 F. 2d 1237.

No. 82-2163. Garbin *v.* Ff1lorida. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 429 So. 2d 15.

No. 82-6204. Tolbert *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 692 F. 2d 1041.

No. 82-6746. Reed *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: 657 P. 2d 662.

No. 82-6794. Davis *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied.

No. 82-6808. Locks *v.* Sumner, Warden of San Quentin Prison. C. A. 9th Cir. Certiorari denied. Reported below: 703 F. 2d 403.

No. 82-6862. Allard *v.* New Hampshire. Sup. Ct. N. H. Certiorari denied. Reported below: 123 N. H. 209, 459 A. 2d 259.

No. 82-6878. Ivy *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 82-6889. AUDIA *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied. Reported below: —— W. Va. ——, 301 S. E. 2d 199.

No. 82-6890. DYSART *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 705 F. 2d 1247.

No. 82-6902. HALL *v.* IOWA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 705 F. 2d 283.

No. 82-6910. FRAZIER ET AL. *v.* MANSON, COMMISSIONER OF CORRECTIONS, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 703 F. 2d 30.

No. 82-6912. GUKEISEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 702 F. 2d 704.

No. 82-6939. UNGER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 700 F. 2d 445.

No. 82-6942. ROBERSON *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 699 F. 2d 1161.

No. 82-6978. NEWSOME *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 110 Ill. App. 3d 1043, 443 N. E. 2d 634.

No. 82-7002. WALLACE *v.* LOCKHART, DIRECTOR OF ARKANSAS DEPARTMENT OF CORRECTIONS. C. A. 8th Cir. Certiorari denied. Reported below: 701 F. 2d 719.

No. 82-7004. ADAMS *v.* DAYAN. C. A. 11th Cir. Certiorari denied. Reported below: 704 F. 2d 1252.

No. 82-7005. BOWRING *v.* WARDEN, POWHATAN CORRECTIONAL CENTER. Sup. Ct. Va. Certiorari denied.

No. 82-7006. CRAIG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 703 F. 2d 581.

No. 82-7015. BANKS ET AL. *v.* BLOCK, SECRETARY OF AGRICULTURE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 700 F. 2d 292.

No. 82-7029. HOWARD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 706 F. 2d 267.

No. 83–29. ROEMER *v.* UNITED STATES; and

No. 83–169. MARCELLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 703 F. 2d 805.

No. 83–35. MALLETTE BROS. CONSTRUCTION CO., INC., ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 695 F. 2d 145.

No. 83–54. LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 704 F. 2d 1382.

No. 83–78. VERRUSSIO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 83–119. IN RE EDWARDS. Sup. Ct. S. C. Certiorari denied. Reported below: 279 S. C. 89, 302 S. E. 2d 339.

No. 83–134. NESGLO, INC., ET AL. *v.* CHASE MANHATTAN BANK, N.A., ET AL. (two cases). C. A. 1st Cir. Certiorari denied.

No. 83–172. COURT HOUSE PLAZA CO. *v.* CITY OF PALO ALTO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 709 F. 2d 1515.

No. 83–193. RANIER & ASSOCIATES ET AL. *v.* WALDSCHMIDT, TRUSTEE; and

No. 83–342. WALDSCHMIDT, TRUSTEE *v.* RANIER & ASSOCIATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 706 F. 2d 171.

No. 83–198. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSN. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 9th Cir. Certiorari denied. Reported below: 701 F. 2d 831.

No. 83–206. MILLER *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 714 F. 2d 160.

No. 83–228. S & VEE CARTAGE CO., INC., ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 704 F. 2d 914.

No. 83–247. GOULD ET AL. *v.* CONTROL LASER CORP. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 705 F. 2d 1340.

No. 83–251. PRC Harris, Inc. *v.* Boeing Co. C. A. 2d Cir. Certiorari denied. Reported below: 700 F. 2d 894.

No. 83–306. Parrott *v.* Wilson et al. C. A. 11th Cir. Certiorari denied. Reported below: 707 F. 2d 1262.

No. 83–311. Strassner *v.* Strassner. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 92 App. Div. 2d 757, 459 N. Y. S. 2d 343.

No. 83–314. Ostric *v.* Corporation of St. Mary's College, Notre Dame, et al. C. A. 7th Cir. Certiorari denied. Reported below: 705 F. 2d 461.

No. 83–315. DeVRY Inc. *v.* McClandon. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 112 Ill. App. 3d 367, 445 N. E. 2d 362.

No. 83–319. Stillman *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 714 F. 2d 238.

No. 83–323. Clemmons *v.* Johnson Brothers Wholesale Liquor Co. Sup. Ct. Kan. Certiorari denied. Reported below: 233 Kan. 405, 661 P. 2d 1242.

No. 83–330. Wold *v.* Bull Valley Management Co., Inc. Sup. Ct. Ill. Certiorari denied. Reported below: 96 Ill. 2d 110, 449 N. E. 2d 112.

No. 83–337. Dew *v.* City of Florence. Sup. Ct. S. C. Certiorari denied. Reported below: 279 S. C. 155, 303 S. E. 2d 664.

No. 83–343. Rouse SI Shopping Center, Inc. *v.* Morse/Diesel, Inc., et al. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1440.

No. 83–344. Formaldehyde Institute, Inc., et al. *v.* Frechette, Commissioner of Public Health of Massachusetts. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 388 Mass. 707, 448 N. E. 2d 367.

No. 83–345. McCarthy et al. *v.* Charles D. Bonanno Linen Service, Inc., et al. C. A. 1st Cir. Certiorari denied. Reported below: 708 F. 2d 1.

No. 83–348. STORRS *v.* STATE MEDICAL BOARD; and ROSI *v.* STATE MEDICAL BOARD. Sup. Ct. Alaska. Certiorari denied. Reported below: 664 P. 2d 547 (first case); 665 P. 2d 28 (second case).

No. 83–349. LANG *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 165 Ga. App. 576, 302 S. E. 2d 683.

No. 83–351. PUERTO RICO ELECTRIC POWER AUTHORITY *v.* GENERAL ELECTRIC CO. Sup. Ct. P. R. Certiorari denied. Reported below: —— P. R. R. ——.

No. 83–352. TRANS-WORLD SEWING MACHINE CO., INC. *v.* STANDARD SEWING EQUIPMENT CORP. Ct. App. Kan. Certiorari denied. Reported below: 8 Kan. App. 2d xxi, 661 P. 2d 409.

No. 83–354. LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO *v.* INGRAM ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 709 F. 2d 807.

No. 83–355. HOLTER ET AL. *v.* MOORE & CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 702 F. 2d 854.

No. 83–362. BERES ET AL. *v.* HOPE HOMES, INC., ET AL. Ct. App. Ohio, Summit County. Certiorari denied. Reported below: 6 Ohio App. 3d 71, 453 N. E. 2d 1119.

No. 83–367. HARDEN *v.* E. I. DU PONT DE NEMOURS & CO. C. A. 3d Cir. Certiorari denied. Reported below: 714 F. 2d 122.

No. 83–377. OFFICENTERS INTERNATIONAL CORP. OF ATLANTA *v.* INTERSTATE NORTH ASSOCIATES. Ct. App. Ga. Certiorari denied. Reported below: 166 Ga. App. 93, 303 S. E. 2d 292.

No. 83–381. METROPOLITAN ERECTING CO., INC. *v.* INRYCO, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 708 F. 2d 1225.

No. 83–384. HUDENBURG *v.* NEFF, EXECUTOR OF THE ESTATE OF LUMMIS, ET AL. Ct. App. Tex., 14th Sup. Jud. Dist. Certiorari denied. Reported below: 643 S. W. 2d 517.

No. 83–386. MASSARSKY *v.* GENERAL MOTORS CORP. C. A. 3d Cir. Certiorari denied. Reported below: 706 F. 2d 111.

No. 83-387. PUTNEY *v.* CONSOLIDATED RAIL CORPORATION. C. A. 4th Cir. Certiorari denied. Reported below: 707 F. 2d 509.

No. 83-390. CITY OF AUSTIN, TEXAS, ET AL. *v.* DECKER COAL CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 701 F. 2d 420.

No. 83-391. CALIFORNIA GLAZED PRODUCTS, INC. *v.* BURNS & RUSSELL COMPANY OF BALTIMORE CITY. C. A. 9th Cir. Certiorari denied. Reported below: 708 F. 2d 1423.

No. 83-392. RUIZ *v.* CUPP, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 714 F. 2d 154.

No. 83-394. MCKENZIE ET AL. *v.* GENERAL MOTORS CORP. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 716 F. 2d 909.

No. 83-402. SKAGGS COS., INC. *v.* WHATLEY. C. A. 10th Cir. Certiorari denied. Reported below: 707 F. 2d 1129.

No. 83-406. GRANT ET AL. *v.* ERIE INSURANCE EXCHANGE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 716 F. 2d 890.

No. 83-407. VICKROY *v.* CITY OF SPRINGFIELD, MISSOURI. C. A. 8th Cir. Certiorari denied. Reported below: 706 F. 2d 853.

No. 83-409. COASTAL STEEL CORP. *v.* WHEELABRATOR-FRYE, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 709 F. 2d 190.

No. 83-417. VU ET UX. *v.* SINGER CO. C. A. 9th Cir. Certiorari denied. Reported below: 706 F. 2d 1027.

No. 83-420. A.D.M. CORP. ET AL. *v.* THOMSON ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 707 F. 2d 25.

No. 83-423. FILLMORE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 428 So. 2d 1375.

No. 83-428. BARWICK *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 280 S. C. 45, 310 S. E. 2d 428.

No. 83-429. DAVIS *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 190 Conn. 327, 461 A. 2d 947.

No. 83–441. YALKOWSKY *v.* MOLLEN, PRESIDING JUSTICE OF APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, SECOND JUDICIAL DEPARTMENT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1441.

No. 83–443. U.S.S. POLYPROPYLENE DIVISION, A DIVISION OF UNITED STATES STEEL CORP. *v.* STUDIENGESELLSCHAFT KOHLE M.B.H. C. A. 2d Cir. Certiorari denied. Reported below: 704 F. 2d 48.

No. 83–444. BALLIVIERO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 708 F. 2d 934.

No. 83–445. OAKLAND RAIDERS *v.* CITY OF BERKELEY. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 143 Cal. App. 3d 636, 192 Cal. Rptr. 66.

No. 83–452. DIXON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 668.

No. 83–456. MILLER ET AL. *v.* UNITED STATES. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 710 F. 2d 656.

No. 83–480. DUCOMMUN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. Reported below: 732 F. 2d 752.

No. 83–482. NATHANSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 702 F. 2d 162.

No. 83–487. MANGALICK ENTERPRISES, INC. *v.* FREEDMAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 662.

No. 83–509. FELDMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 711 F. 2d 758.

No. 83–519. NATIONAL CASH REGISTER CORP. *v.* ROSE. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 225.

No. 83–532. COHEN ET UX. *v.* SMITH, ATTORNEY GENERAL, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 705 F. 2d 467.

No. 83–5014. HELMICH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 704 F. 2d 547.

No. 83-5016. ADAMS *v.* FLORIDA PAROLE AND PROBATION COMMISSION. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 422 So. 2d 953.

No. 83-5017. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 709 F. 2d 1519.

No. 83-5035. WARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 83-5037. ROBBINS *v.* MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 711 F. 2d 1058.

No. 83-5067. EDGINGTON ET AL. *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 99 N. M. 715, 663 P. 2d 374.

No. 83-5087. KOENIG *v.* SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied. Reported below: 333 N. W. 2d 800.

No. 83-5109. LITT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 711 F. 2d 1060.

No. 83-5117. HILL *v.* ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTE AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 709 F. 2d 232.

No. 83-5122. PERSINGER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 709 F. 2d 1496.

No. 83-5162. GUTIERREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 708 F. 2d 732.

No. 83-5168. GRAHAM *v.* HOUSEMAN, ACTING DISTRICT DIRECTOR OF THE PORTLAND OFFICE OF THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, ET AL. C. A. 9th Cir. Certiorari denied.

No. 83-5171. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 709 F. 2d 1514.

No. 83-5189. DAMPIER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 111 Ill. App. 3d 1159, 455 N. E. 2d 572.

No. 83-5213. Barnett *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 714 F. 2d 125.

No. 83-5280. Connor *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 679 F. 2d 889.

No. 83-5334. Attwell *v.* Heckler, Secretary of Health and Human Services. C. A. 11th Cir. Certiorari denied. Reported below: 707 F. 2d 522.

No. 83-5340. Burnette *v.* Ponte, Superintendent, Massachusetts Correctional Institute. C. A. 1st Cir. Certiorari denied. Reported below: 714 F. 2d 110.

No. 83-5342. McAdoo *v.* Federal Bureau of Investigation. C. A. D. C. Cir. Certiorari denied.

No. 83-5343. Higgs *v.* Kentucky. Sup. Ct. Ky. Certiorari denied.

No. 83-5344. Wachter *v.* Green et al. C. A. 11th Cir. Certiorari denied.

No. 83-5347. Fair *v.* Department of Social Services. Cir. Ct. Mich., Ingham County. Certiorari denied.

No. 83-5348. Siroonian *v.* New York Foundling Hospital et al. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 92 App. Div. 2d 826, 460 N. Y. S. 2d 735.

No. 83-5358. Kent *v.* New York City Department of Sanitation. C. A. 2d Cir. Certiorari denied. Reported below: 722 F. 2d 728.

No. 83-5360. Appleby *v.* Massachusetts. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 389 Mass. 359, 450 N. E. 2d 1070.

No. 83-5363. Cauble *v.* United States;
No. 83-5382. Williams *v.* United States; and
No. 83-5383. Guion *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 714 F. 2d 134.

No. 83-5369. Donnell *v.* Freeman et al. Sup. Ct. Mo. Certiorari denied.

No. 83-5379. RONSON *v.* WALTERS, COMMISSIONER OF CORRECTIONS OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied.

No. 83-5392. SERVIDIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 716 F. 2d 893.

No. 83-5395. HARREN *v.* GARRISON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 716 F. 2d 895.

No. 83-5401. MARSHALL *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 83-5409. GROCE *v.* WASHINGTON STATE DEPARTMENT OF CORRECTIONS ET AL. C. A. 9th Cir. Certiorari denied.

No. 83-5418. JOHNSON *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 714 F. 2d 140.

No. 83-5422. EDWARDS *v.* DENTON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 714 F. 2d 139.

No. 83-5433. JAMESON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 707 F. 2d 978.

No. 83-5479. LAU TUNG LAM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 714 F. 2d 209.

No. 83-5482. JOHNSON, AKA LATIF *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 714 F. 2d 134.

No. 83-5492. GALLOP *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 714 F. 2d 155.

No. 83-5496. SIMPSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 709 F. 2d 903.

No. 83-5506. CLARK *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 82-1861. MCCARREN ET AL. *v.* TOWN OF SPRINGFIELD, VERMONT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 722 F. 2d 728.

JUSTICE REHNQUIST, dissenting.

The town of Springfield, Vermont, wishes to construct and operate a hydroelectric generating facility on the neighboring Black

River, and in June 1978, applied to the Federal Energy Regulatory Commission for a license to do so. FERC has never ruled on this application. In January 1980, the town of Cavendish, Vermont, petitioned the Vermont Public Service Board for a declaratory judgment that Springfield's proposed project was subject to the provisions of Vt. Stat. Ann., Tit. 30, § 248 (Supp. 1983), which states that "[n]o company as defined [herein] . . . may begin site preparation for or construction of an electric generating facility within the state . . . unless the . . . board . . . [issues a certificate of public good]." App. to Pet. for Cert. 58a–59a.

Springfield appeared before the Public Service Board and contended that FERC's licensing jurisdiction pre-empted the authority of the Board, but after briefing and argument the Board ruled that it had jurisdiction under § 248 and prohibited Springfield from commencing site preparation until Springfield obtained a certificate of public good.

Although Vermont law afforded Springfield a right of appeal from the Board's decision to the Supreme Court of Vermont, Springfield did not avail itself of this right. Instead, it collaterally attacked the Board's ruling by an action filed in the United States District Court for the District of Vermont, seeking a declaratory judgment that the Board's ruling was null and void on pre-emptive grounds. The District Court, in a thorough and well-reasoned opinion, canvassed the related issues raised by petitioners as a defense to its proceeding with the respondent's suit: res judicata, abstention, and the principles of *Younger* v. *Harris*, 401 U. S. 37 (1971). 549 F. Supp. 1134 (1982). Rejecting all of them, it ruled in favor of respondents on the merits of the preemption claim, and the Court of Appeals affirmed substantially for the reasons set forth in the opinion of the District Court. 722 F. 2d 728 (1983). I would grant certiorari to review the District Court's refusal to accord any res judicata weight to the determination of the Vermont Public Service Board.

The District Court held that res judicata did not apply, because "the policy against permitting [the Board] to act beyond its jurisdiction outweighs the policy underlying the doctrine of *res judicata*." 549 F. Supp., at 1148. The District Court, relying on our decisions in *Durfee* v. *Duke*, 375 U. S. 106 (1963), and *Kalb* v. *Feuerstein*, 308 U. S. 433 (1940), in effect held that where the merits of the issue tendered by the federal plaintiff could result in a conclusion that the federal regulatory scheme ousted the state regulatory scheme, res judicata does not apply. I think this misreads the decisions upon which the District Court relied, and slights our recent decision in *Insurance Corporation of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 702, n. 9 (1982), where the Court said:

> "A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal. See *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371 (1940); *Stoll* v. *Gottlieb*, 305 U. S. 165 (1938)."

Kalb v. *Feuerstein* was a case in which Congress had confided exclusive jurisdiction for settlement of claims to the federal bankruptcy courts, and thereby ousted the state courts of jurisdiction to adjudicate such claims. 308 U. S., at 440. But here, although the federal courts may have reached an entirely correct conclusion on the merits of the federal pre-emption issue, there is not the remotest suggestion that Congress by enactment of legislation authorizing federal licensing of hydroelectric projects intended to deprive the Vermont Public Service Board of authority to hear any claim relating to such projects that would otherwise be within the jurisdiction of the Board.

Although the fact that the adjudicating agency in this case was a state agency, rather than a state court, may make some difference as to the extent to which res judicata principles apply, it is by no means dispositive of the issue.* "Occasionally courts have used language to the effect that *res judicata* principles do not apply to administrative proceedings, but such language is certainly too broad." *United States* v. *Utah Construction & Mining Co.*, 384 U. S. 394, 421–422 (1966) (footnotes omitted).

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*This case may also present a question left open in *Gibson* v. *Berryhill*, 411 U. S. 564, 575–577 (1973): whether respondents were required by the line of cases beginning with *Younger* v. *Harris*, 401 U. S. 37 (1971), to pursue their avenues of appeal from the administrative ruling within the state court system. As this Court observed in *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, 608 (1975), "[v]irtually all of the evils at which *Younger* is directed . . . inhere in federal intervention prior to completion of state appellate proceedings."

At a time when judges and observers are increasingly concerned with the workload of the federal courts, the application of principles of res judicata to disputes such as this might both conserve the time of the federal courts and make for a more orderly resolution of this and similar disputes.

No. 82–1971. SCHAEFER *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 697 F. 2d 558 and 702 F. 2d 57.

JUSTICE O'CONNOR, with whom JUSTICE POWELL and JUSTICE REHNQUIST join, dissenting.

I would grant certiorari in this case to clarify the application of the National Labor Relations Board's policy of deferral to private resolutions of labor disputes. The Board applies this formal policy to both arbitral and nonarbitral settlements of labor disputes, including settlements of unfair labor practice charges. See *Central Cartage Co.*, 206 N. L. R. B. 337, 338 (1973). In this case, petitioner made apparent concessions in collective-bargaining negotiations to get the employees' union to withdraw its unfair labor practice charges. See 246 N. L. R. B. 181, 187, 190 (1979). Petitioner also paid cash settlements to four employees in exchange for waivers of any backpay they might be entitled to receive. 261 N. L. R. B. 272, 273 (1982). The Board refused, however, to defer to the union's waiver because the parties had not resolved the legal merits of the charges and because petitioner had not provided substantial remedies for his unfair labor practice. 246 N. L. R. B., at 190. The Board also determined that the four employees could not settle their backpay claims without Board approval and ordered petitioner to make full restitution. 261 N. L. R. B., at 273. The Court of Appeals for the Third Circuit affirmed. 697 F. 2d 558 (1983).

I

The Board's application of its deferral policy in this case is inexplicable. For example, the Board asserts that the settlement negotiations did not address and resolve the unfair labor practice claims. Brief in Opposition 7–8. The record clearly indicates, however, and, ironically, the Board's General Counsel found objectionable, see 246 N. L. R. B., at 190, that petitioner and the union engaged in extensive discussions concerning withdrawal of the charges. *Id.*, at 187. The Board has regularly held that its decision to defer does not depend on whether it agrees with the parties' actual resolution of the dispute. See, *e. g.*, *Howard Electric Co.*, 166 N. L. R. B. 338, 341 (1967) (deference to arbitral settlement); *Terminal Transport Co.*, 185 N. L. R. B. 672, 673 (1970) (same). Rather, it requires the parties to discuss the charges to assure that the employees have made a clear and knowing waiver of their statutory right to process complaints before the Board. See *Coca-Cola Bottling Co.*, 243 N. L. R. B. 501, 502 (1979) (deference to nonarbitral settlement). It is beyond peradventure that the union and the four employees who accepted cash settlements made such a waiver here.

Similarly, the record contradicts the Board's contention that petitioner did not remedy the unfair labor practice. Brief in Opposition 8–9. Surely at least some of petitioner's bargaining concessions were attributable to the union's agreement to withdraw the unfair labor practice charges. Any concessions the union made, including waiver of the charges, would be binding upon the employees, absent evidence that the union acted in bad faith. See *Hines* v. *Anchor Motor Freight, Inc.*, 424 U. S. 554, 564–567 (1976). Even if the union's waiver was not determinative, the cash settlements the four employees accepted would be. No one who understands the economic logic of the old hunter's adage that "a bird in the hand is worth two in the bush" could dispute the substantiality of the remedy provided. Certainly the Board cannot do so, as it has approved settlements which contained *no* backpay awards. See, *e. g.*, *Krause Honda, Ltd.*, 8 AMR ¶ 18,221 (1981) (nonarbitral settlement); *Beloit Corp., Jones Division*, 6 AMR ¶ 14,177 (1979) (same).

Moreover, the Board's assertion that settlements reached *after* its decisions have issued are not substantial remedies is contrary to its previous rulings. See, *e. g.*, *Krause Honda, Ltd.*, *supra* (ruling that the timing of settlements does not affect Board's deferral policy). Issuance of an adverse Board decision should make employers more willing to settle on more generous terms. Thus, settlements reached after Board decisions should be more, not less, likely to afford substantial redress for violations of the Act than are settlements reached before that time. The Board has not articulated a substantial reason for treating such a settlement less deferentially in this case.

Finally, the Board's assertion that formal determinations of backpay claims are preferable to private resolutions of such claims, 261 N. L. R. B., at 273; 697 F. 2d, at 562, is antithetical both to the national labor policy of encouraging private dispute resolutions and to the Board's own statements that nonarbitral settlements deserve as much respect as formal resolutions of backpay claims. See *Krause Honda, Ltd., supra; Coca-Cola Bottling Co., supra.* Again, the Board has offered no reason for departing from its longstanding policy in this case.

II

Were this simply an isolated instance of law being erroneously applied to the facts of this case I would not suggest that the Court expend its time and resources reviewing it, but the opinions of the Courts of Appeals strongly suggest that there is marked disagreement on the circumstances under which the policy of Board deferral must be exercised. See, *e. g.*, *Roadway Express, Inc.* v. *NLRB*, 647 F. 2d 415, 422–423, and n. 15 (CA4 1981) (noting four opinions of Board and criticizing inconsistent application of deferral policy to nonarbitral settlements); *NLRB* v. *Pincus Brothers, Inc.-Maxwell*, 620 F. 2d 367 (CA3 1980) (three opinions on application of deferral policy to arbitral settlement); *Douglas Aircraft Co.* v. *NLRB*, 609 F. 2d 352 (CA9 1979) (Board must defer to arbitral settlement unless it is "palpably wrong"). In my opinion, this intercircuit confusion makes this case appropriate for certiorari review.

Moreover, I believe that an essential aspect of our national labor policy is at stake in this case. A commitment to private dispute resolution undergirds our entire national labor policy, which recognizes that the societal rewards of private negotiations outweigh any need for uniformity of result or adjudicative resolution of every labor dispute. Parties accept the risk that private settlements will differ from possible Board dispositions when they elect to proceed by negotiation, and the Board recognizes such possibilities when it adopts a policy of deference. The Board's deferral policy is deeply rooted in our national commitment to private dispute resolution and, until openly and expressly changed, must be applied uniformly and strictly. Private dispute resolution processes become unworkable if their finality is cast into doubt by the prospect of unprincipled Board interference. When there is confusion about the circumstances in which deference will be exercised, employers and employees cannot be fully committed to private dispute resolution as a means of achieving industrial stability. I would therefore grant certiorari to clarify the application of this important national labor policy.

No. 82–2028. ARNOTT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 704 F. 2d 322.

JUSTICE WHITE, dissenting.

The petition for certiorari raises several issues, all but one of which do not warrant this Court's review.

Petitioner Paul Arnott was convicted of a variety of drug-related offenses following a jury trial in which a number of hearsay statements made by his alleged co-conspirators were admitted. Before the trial commenced, the District Court ruled that such statements would be admitted conditionally subject to a later demonstration of their admissibility by a preponderance of the evidence under the procedure approved by the Sixth Circuit in *United States* v. *Vinson*, 606 F. 2d 149, 153 (1979), cert. denied, 444 U. S. 1074 and 445 U. S. 904 (1980). At the close of the Government's case, petitioner moved to strike the co-conspirators' statements that had been admitted over his continuing objection. In his view, the Government had failed to demonstrate that (1) a conspiracy existed, (2) petitioner was a member of the conspiracy, and (3) the hearsay statements were made in the course and in furtherance of the conspiracy. See 606 F. 2d, at 152. The District Court denied petitioner's motion.

On appeal, petitioner contended that the District Court had abused its discretion in considering the statements themselves in determining whether the Government had satisfied the prerequisites to admission of those statements. Without commenting on the sufficiency of the Government's independent evidence, the Court of Appeals simply reaffirmed its previous holdings that Federal Rule of Evidence 104(a) had modified prior law to the contrary so as to authorize the consideration of challenged hearsay statements in deciding the preliminary question of admissibility, see, *e. g.*, *United States* v. *Cassity*, 631 F. 2d 461, 464 (1980); *United States* v. *Vinson*, *supra*, at 153, and rejected petitioner's contention. 704 F. 2d 322, 325 (1983).

The rule adopted by the Sixth Circuit and applied in this case conflicts with the one enunciated by every other Court of Appeals that has addressed the issue. Those courts have, almost without exception, admitted statements of co-conspirators only upon a showing by a preponderance of independent evidence that a conspiracy existed in which the declarant and the defendant were both members and that the challenged statements were made in furtherance of the conspiracy. See *United States* v. *Nardi*, 633 F. 2d 972, 974 (CA1 1980); *United States* v. *Alvarez-Porras*, 643 F. 2d 54, 56–57 (CA2), cert. denied, 454 U. S. 839 (1981); *Government of Virgin Islands* v. *Dowling*, 633 F. 2d 660, 665 (CA3), cert. denied, 449 U. S. 960 (1980); *United States* v. *Gresko*, 632 F. 2d 1128, 1131–1132 (CA4 1980); *United States* v. *James*, 590 F. 2d 575, 580–581 (CA5) (en banc), cert. denied, 442 U. S. 917 (1979); *United States* v. *Regilio*, 669 F. 2d 1169, 1174 (CA7 1981), cert. denied, 457 U. S. 1133 (1982); *United States* v. *Bell*, 573 F. 2d 1040, 1043–1044 (CA8 1978); *United States* v. *Andrews*, 585 F. 2d 961, 964–967 (CA10 1978); *United States* v. *Monaco*, 702 F. 2d 860, 876–880 (CA11 1983) (stating standard in terms of both substantial evidence and preponderance of the evidence); *United States* v. *Jackson*, 201 U. S. App. D. C. 212, 227–234, 627 F. 2d 1198, 1213–1220 (1980). The Ninth Circuit requires independent evidence sufficient to establish a prima facie case that a conspiracy existed and that the defendant was part of it. See *United States* v. *Miranda-Uriarte*, 649 F. 2d 1345, 1349–1350 (1981). See also *United States* v. *Nixon*, 418 U. S. 683, 701, and n. 14 (1974) (dicta).

In opposing the petition, the Government argues that it introduced sufficient independent evidence of the existence of a conspiracy and of the membership of petitioner and the declarants to render the hearsay statements admissible under the test adopted by most Courts of Appeals. Although a close examination of the record might support this claim, the Court of Appeals made no finding concerning the weight of the independent evidence and did not purport to hold that the prerequisites to admission of co-conspirator statements established by Federal Rule of Evidence 801(d)(2)(E) would have been satisfied had the District Court not considered the statements themselves. Similarly, the Court of Appeals' conclusion that one co-conspirator's statements "were few and cumulative to the overwhelming evidence against Arnott," 704 F. 2d, at 325, does not establish that all of the admitted statements, considered together, did not prejudice petitioner. This Court need not scour the record to find alternative justifications—not relied on below—for a decision resting on a legal principle that consistently has been repudiated in other Circuits.

Accordingly, I would grant the petition for certiorari and set the case for oral argument.

No. 82–2107. ALABAMA *v.* TAYLOR. Ct. Crim. App. Ala. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 429 So. 2d 1172.

No. 83–340. GREER, WARDEN, MENARD CORRECTIONAL CENTER *v.* PARISIE. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 705 F. 2d 882.

No. 83–63. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 323, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 11th Cir. Certiorari denied. Reported below: 703 F. 2d 501.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, dissenting.

After determining that one of its members was working in a supervisory capacity for a nonunion employer, Local No. 323 of the International Brotherhood of Electrical Workers (IBEW) charged the employee with violating the IBEW constitution. That document provides that a member may be penalized for "[w]orking in the interest of any organization or cause which is detrimental to, or opposed to, the I. B. E. W." The employee was fined and ultimately expelled from the union.

The National Labor Relations Board charged the Local with an unfair labor practice for violating § 8(b)(1)(B) of the National Labor Relations Act, 49 Stat. 452, as amended, 29 U. S. C. § 158(b)(1)(B), which provides in pertinent part that "[i]t shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." After a hearing, the Administrative Law Judge found that the discipline was imposed for "working for a nonunion contractor," which in his view constituted unlawful coercion. On review, the Board adopted the Administrative Law Judge's findings and conclusions. It issued a cease-and-desist order and ordered various affirmative relief. 255 N. L. R. B. 1395 (1981).

The Board then successfully petitioned the Court of Appeals for the Eleventh Circuit for enforcement of its order. The court noted that in *NLRB* v. *International Brotherhood of Electrical Workers, Local 73 (Chewelah Contractors, Inc.)*, 621 F. 2d 1035 (1980), the Court of Appeals for the Ninth Circuit had held that a union does not violate § 8(b)(1)(B) by disciplining a member-supervisor for his employment with a nonunion company if the union neither represents the company's employees nor displays a representational interest in them. The Eleventh Circuit declined to adopt the Ninth Circuit's interpretation of the statute, stating that it found the *Chewelah* limitation inconsistent with the statute's central aim. 703 F. 2d 501, 507 (1983). It held that regardless of whether the union displays a representational interest in the company's employees, an attempt to force a member supervisor to cease working for a nonunion company infringes the employer's right to select that person as its representative.

The conflict between the Ninth Circuit and the Eleventh Circuit is clear. Identical action by a union will constitute an unfair labor practice in the Eleventh Circuit but not in the Ninth. Implementation of the national labor policy is hampered by such conflicting rules. Accordingly, I would grant the petition to settle the conflict.

No. 83–151. MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY *v.* WALKER. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 959.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

Respondent Walker was indicted in Stark County, Ohio, for murdering an off-duty policeman during a grocery store robbery in July 1972. Two accomplices, the wife of the victim, and a disinterested eyewitness identified respondent as the perpetrator of the murder. Respondent's defense was alibi; the records of the jail in Cuyahoga County, Ohio, showed on their face that Walker was incarcerated there between April 14 and August 1, 1972. If these records were accurate, Walker could not have been in the grocery store on July 22, 1972, when the murder took place. The accuracy of these records was hotly contested at trial.

After a jury trial respondent was convicted of first-degree murder. His conviction was affirmed by the Ohio Court of Appeals and by the Supreme Court of Ohio, *State* v. *Walker*, 55 Ohio St.

2d 208, 378 N. E. 2d 1049 (1978), cert. denied, 441 U. S. 924 (1979). Respondent then sought federal habeas relief in the United States District Court for the Northern District of Ohio, which granted the writ on the ground that six evidentiary rulings of the Ohio trial court concerning the scope of prosecutorial cross-examination and rebuttal testimony denied respondent a fair trial as guaranteed by the Fourteenth Amendment. The Court of Appeals for the Sixth Circuit affirmed the judgment on the same grounds. *Walker* v. *Engle*, 703 F. 2d 959 (1983). I would grant certiorari to review this novel holding that trial rulings on the scope of prosecutorial cross-examination and rebuttal testimony are cognizable on federal habeas. No case from this Court has ever held that they are, and several of our cases strongly suggest that they are not. See *Davis* v. *Alaska*, 415 U. S. 308, 317 (1974); *Lisenba* v. *California*, 314 U. S. 219, 227 (1941); see also *Donnelly* v. *DeChristoforo*, 416 U. S. 637 (1974) (prosecutorial misconduct); *Cupp* v. *Naughten*, 414 U. S. 141 (1973) (erroneous jury instruction).

Respondent has contended throughout that irrelevant and prejudicial evidence was allowed before the jury. The Supreme Court of Ohio rejected his contention with this language:

> "Upon a review of the contested testimony, we find that it was relevant, in that it tended to disprove the accuracy of the jail records, which was a question in dispute in the instant cause. The contested evidence went to the credibility of the various jail records by demonstrating the overall inefficiency of the persons and the system in which they were maintained and the general lack of inmate supervision.
>
> "Moreover, upon an examination of the record, we find that the admission of certain of this testimony occurred without an objection and that a great proportion of this testimony occurred during cross-examination. The trial judge is posited with broad discretion in controlling cross-examination, and the appellant has the burden to show a patent abuse of discretion. We find, in the instant cause, that the admission of this testimony was relevant to the credibility of the jail records which support appellant's alibi and was neither an abuse of discretion nor a resultant prejudicial harm to appellant." *State* v. *Walker, supra,* at 214, 378 N. E. 2d, at 1052–1053 (footnote and citations omitted).

The District Court and the Court of Appeals, without suggesting that there was anything peculiar about the Ohio rules regarding relevancy or the trial court's discretion to control the examination of witnesses, picked out six isolated instances in which those courts thought that prosecutorial cross-examination or rebuttal examination had been too broad, thereby infecting respondent's entire trial with some sort of federal constitutional error:

(1) Defense witnesses were asked about the conviction of "Major" Payne, a former Warden of the jail, for theft of property from the jail. Payne had not been Warden at the time respondent was allegedly incarcerated, however, and Payne's conviction occurred after respondent's recorded period of detention. Disagreeing with the Supreme Court of Ohio, the Court of Appeals held that testimony relating to Payne's conviction for stealing evidence had "no apparent connection to the issue whether a *prisoner* could leave the jail *and return* undetected." *Walker* v. *Engle*, 703 F. 2d, at 963 (emphasis in original).

(2) Jail commissary records were introduced to show that Walker made numerous transactions during his confinement, including one on the day of the crime. The prosecutor tried to undermine this circumstantial evidence with testimony from jail deputies that other inmates could have made purchases on Walker's commissary account.

The State also called Frank Lancianese, an examiner for the Office of the State Auditor. He testified that (1) an audit of the commissary account between 1969 and 1975 revealed a $66,000 shortage; (2) the Sheriff's Department obstructed access to the commissary records; and (3) an audit of jail vending machine profits showed $9,000 unaccounted for by the Sheriff's Department. The Court of Appeals determined that this rebuttal testimony was not relevant to impeaching the accuracy of commissary records used by respondent to support his alibi, saying that "the alleged thefts did not affect the *record of commissary transactions* relied on by Walker, but showed merely that *commissary* funds may have at some time been misappropriated by Sheriff's Department personnel." *Id.*, at 964 (emphasis in original).

(3) In the words of the Court of Appeals, "[t]he prosecution was permitted, without any basis in the record, to insinuate [on cross-examination] that several defense witnesses from the Sheriff's Department were being monitored and coached by Tom Booth in fur-

therance of a Sheriff's Department coverup of improprieties." *Ibid.*

(4) Respondent was first located in Chicago, Illinois, and a prosecution rebuttal witness was permitted to testify that Cuyahoga County authorities impeded respondent's return to Stark County. The Court of Appeals rejected the State's claim of relevancy, describing the testimony as "highly irrelevant and prejudicial conjecture." *Ibid.*

(5) The State called as one of its witnesses John Appling, a prisoner who had served as a "range boss" for the cellblock to which Walker was assigned. Appling took the stand, identified himself, and refused to testify on the basis that his testimony might incriminate him. The State then questioned other witnesses concerning Appling, seeking, in the words of the Ohio Supreme Court, "to test the recollection and credibility of the witnesses . . . ." *State* v. *Walker*, 55 Ohio St. 2d, at 218, 378 N. E. 2d, at 1054. The District Court, in sharp contrast, thought that this testimony "suggest[ed] to the jury that Appling's testimony would have been helpful to the prosecution had he testified . . . ." *Walker* v. *Engle*, C79–2132 (ND Ohio, Jan. 28, 1981), App. to Pet. for Cert. A41. The Court of Appeals agreed.

(6) The Court of Appeals also found objectionable the State's use, over objection, of newspaper clippings to refresh the recollection of defense witnesses during cross-examination regarding the conditions at the Cuyahoga County jail. The clippings referred to problems within the jail, and the Court of Appeals thought the use of these clippings had an "inflammatory and prejudicial effect upon the jury." *Walker* v. *Engle*, *supra*, at 968.

The lower courts agreed that the evidence could sustain respondent's conviction for the murder with which he was charged. What the Court of Appeals did, in effect, was to select from this massive evidence three examples of trial rulings respecting the examination of defense witnesses, one ruling respecting a witness who refused to testify, and two instances of the scope of rebuttal testimony, and to conclude that their combined effect was to deny respondent a "fair trial." In so doing, I think the Court of Appeals went far beyond the permissible scope of federal habeas review of a state conviction.

Whether we as trial judges in this case would have limited cross-examination or rebuttal testimony more stringently than did the judge who presided over the trial is scarcely material to the inquiry on federal habeas corpus. The prosecution was trying to impeach documentary evidence which gave a criminal defendant, placed at the scene of the crime by several witnesses, an apparently airtight alibi—that he was confined in jail in another county when the crime occurred. The manner in which these records might be impeached, whether by showing potential inaccuracies in the methods by which they were kept, or by showing other deficiencies in the office that was responsible for keeping the records, must under our system be left to the discretion of the trial judge. In *Lisenba* v. *California*, 314 U. S., at 227–228, this Court said:

> "The Fourteenth Amendment leaves California free to adopt a rule of relevance which the court below holds was applied here in accordance with the state's law."

This Court has even gone so far as to overturn a trial judge's ruling *limiting* cross-examination, stating that under the Confrontation Clause of the United States Constitution,

> "[s]ubject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, *i. e.*, discredit, the witness." *Davis* v. *Alaska*, 415 U. S., at 316.

By failing to heed the rulings in *Lisenba* and *Davis*, the Court of Appeals impermissibly intruded federal habeas review into essentially discretionary rulings of a state trial judge on a hotly contested issue at trial. I would grant certiorari to review its judgment.

No. 83–171. TRANSAMERICA COMPUTER CO., INC. *v.* INTERNATIONAL BUSINESS MACHINES CORP. C. A. 9th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 698 F. 2d 1377.

No. 83–418. AFFELDT ET AL. *v.* J. C. PENNEY CO. C. A. 6th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 714 F. 2d 138.

No. 83–190. ABATTI FARMS, INC., ET AL. *v.* AGRICULTURAL LABOR RELATIONS BOARD ET AL. Ct. App. Cal., 4th App. Dist. Motion of Western Growers Association for leave to file a brief as *amicus curiae* granted. Certiorari denied.

No. 83-272. BASIC CONSTRUCTION CO. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 711 F. 2d 570.

No. 83-282. WILSON ET AL. *v.* BLOCK, SECRETARY OF AGRICULTURE, ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 228 U. S. App. D. C. 166, 708 F. 2d 735.

No. 83-388. E-SYSTEMS, INC., ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL. C. A. 5th Cir. Motion of respondent Howard R. Clymer for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 694 F. 2d 720.

No. 83-5025. LARSEN *v.* SIELAFF ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 702 F. 2d 116.

No. 83-5329. BUFORD *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla.; and

No. 83-5354. AMADEO *v.* KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Sup. Ct. Ga. Certiorari denied. Reported below: No. 83-5329, 428 So. 2d 1389.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

NOVEMBER 4, 1983

Dismissal Under Rule 53

No. 83-389. FILCO ET AL. *v.* AMANA REFRIGERATION, INC., ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 709 F. 2d 1257.

NOVEMBER 7, 1983

Appeals Dismissed

No. 83-430. HEIMBACH, COUNTY EXECUTIVE OF ORANGE COUNTY, ET AL. *v.* NEW YORK ET AL. Appeal from Ct. App.

N. Y. dismissed for want of substantial federal question. Reported below: 59 N. Y. 2d 891, 452 N. E. 2d 1264.

No. 83–449. BURKE DISTRIBUTING CORP., DBA B & W TRANSPORTATION, ET AL. *v.* MASSACHUSETTS. Appeal from Sup. Jud. Ct. Mass. dismissed for want of substantial federal question. Reported below: 388 Mass. 799, 448 N. E. 2d 728.

No. 83–467. PAULSON ET AL. *v.* COUNTY OF PIERCE. Appeal from Sup. Ct. Wash. dismissed for want of substantial federal question. Reported below: 99 Wash. 2d 645, 664 P. 2d 1202.

Certiorari Granted—Vacated and Remanded. (See also No. 82–6848, *ante*, p. 44.)

No. 82–1712. SUMNER, WARDEN *v.* MATA. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded with directions to dismiss the appeal as moot. JUSTICE STEVENS would deny certiorari. Reported below: 696 F. 2d 1244.

Miscellaneous Orders

No. A–310 (82–6982). NARCISSE *v.* LOUISIANA, *ante*, p. 865. Application to suspend the effect of the order denying certiorari pending action on the petition for rehearing, addressed to JUSTICE BRENNAN and referred to the Court, denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the application.

No. D–345. IN RE DISBARMENT OF WALGREN. Disbarment entered. [For earlier order herein, see 461 U. S. 941.]

No. D–355. IN RE DISBARMENT OF GELB. Disbarment entered. [For earlier order herein, see 462 U. S. 1103.]

No. D–357. IN RE DISBARMENT OF HARTHUN. Disbarment entered. [For earlier order herein, see 462 U. S. 1103.]

No. D–358. IN RE DISBARMENT OF SHEEHAN. Disbarment entered. [For earlier order herein, see 462 U. S. 1103.]

No. D–359. IN RE DISBARMENT OF MCCOMB. Disbarment entered. [For earlier order herein, see 462 U. S. 1104.]

No. D–360. IN RE DISBARMENT OF TABENKEN. Disbarment entered. [For earlier order herein, see 462 U. S. 1114.]

No. D–363. IN RE DISBARMENT OF GIGLIOTTI. Disbarment entered. [For earlier order herein, see 462 U. S. 1128.]

No. D–364. IN RE DISBARMENT OF DOWNES. Disbarment entered. [For earlier order herein, see 463 U. S. 1204.]

No. D–381. IN RE DISBARMENT OF CAIRO. It is ordered that Victor C. Cairo, of Racine, Wis., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–384. IN RE DISBARMENT OF BIZAR. It is ordered that Philip Harold Bizar, of Highland Park, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–385. IN RE DISBARMENT OF DRAWDY. It is ordered that J. Wesley Drawdy, of Columbia, S. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–386. IN RE DISBARMENT OF PERLOW. It is ordered that Solomon Perlow, of Lawrence, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–387. IN RE DISBARMENT OF MANDELL. It is ordered that Irving Mandell, of Valley Stream, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 82–485. KEETON *v.* HUSTLER MAGAZINE, INC., ET AL. C. A. 1st Cir. [Certiorari granted, 459 U. S. 1169.] Treating the telegram of David L. Kahn, Esquire, received November 3, 1983, as a motion of Larry Flynt for leave to present oral argument *pro se*, the motion is denied. Stephen M. Shapiro, Esquire, of Chicago, Ill., is invited to present oral argument as *amicus curiae* in support of the judgment below.

No. 82-940. HISHON *v.* KING & SPALDING. C. A. 11th Cir. [Certiorari granted, 459 U. S. 1169.] Motion of petitioner for leave to file reply brief out of time denied.

No. 83-5384. BOYLAN *v.* UNITED STATES POSTAL SERVICE. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until November 28, 1983, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, *ante*, p. 928, we would deny the petition for certiorari in this case without reaching the merits of the motion to proceed *in forma pauperis*.

No. 83-5440. IN RE GREEN; and

No. 83-5444. IN RE PERCHARO. Petitions for writs of mandamus denied.

Certiorari Granted

No. 83-18. DUN & BRADSTREET, INC. *v.* GREENMOSS BUILDERS, INC. Sup. Ct. Vt. Certiorari granted. Reported below: 143 Vt. 66, 461 A. 2d 414.

No. 83-317. BLOCK, SHERIFF OF THE COUNTY OF LOS ANGELES, ET AL. *v.* RUTHERFORD ET AL. C. A. 9th Cir. Motion of respondent Dennis Rutherford for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 710 F. 2d 572.

No. 83-321. WALLER *v.* GEORGIA; and

No. 83-322. COLE ET AL. *v.* GEORGIA. Sup. Ct. Ga. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 251 Ga. 124, 303 S. E. 2d 437.

Certiorari Denied

No. 82-538. GODOY, AKA WOOD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 678 F. 2d 84.

No. 82-2082. LARSEN ET AL. *v.* FISHER; and

No. 82-2130. FISHER *v.* LARSEN ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 138 Cal. App. 3d 627, 188 Cal. Rptr. 216.

No. 82–6810. Mason *v.* Mississippi. Sup. Ct. Miss. Certiorari denied. Reported below: 429 So. 2d 569.

No. 82–6825. Kinner *v.* Morris, Warden. C. A. 9th Cir. Certiorari denied.

No. 82–6946. Ferguson *v.* Johnson et al. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1501.

No. 83–22. City of Rockford et al. *v.* Kaske et al. Sup. Ct. Ill. Certiorari denied. Reported below: 96 Ill. 2d 298, 450 N. E. 2d 314.

No. 83–64. Alvero Cruz *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 698 F. 2d 1148.

No. 83–65. Leaseway Transportation Corp. et al. *v.* United States et al. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1510.

No. 83–71. United Parcel Service, Inc. *v.* National Labor Relations Board. C. A. 3d Cir. Certiorari denied. Reported below: 706 F. 2d 972.

No. 83–79. Jensen *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 83–90. Portsmouth Redevelopment and Housing Authority *v.* Pierce, Secretary of Housing and Urban Development, et al. C. A. 4th Cir. Certiorari denied. Reported below: 706 F. 2d 471.

No. 83–162. New York State Department of Taxation and Finance et al. *v.* Air Transport Association of America. Ct. App. N. Y. Certiorari denied. Reported below: 59 N. Y. 2d 917, 453 N. E. 2d 548.

No. 83–179. Posey *v.* Skyline Corp. C. A. 7th Cir. Certiorari denied. Reported below: 702 F. 2d 102.

No. 83–180. Southern Pacific Transportation Co. *v.* Secretary of the Interior et al. C. A. 9th Cir. Certiorari denied. Reported below: 700 F. 2d 550.

No. 83–184. Hodges *v.* Board of Commissioners on Grievances and Discipline. Sup. Ct. S. C. Certiorari denied. Reported below: 279 S. C. 128, 303 S. E. 2d 89.

No. 83–278. Bobo *v.* DuCharme, Superintendent, Washington State Penitentiary, et al. C. A. 9th Cir. Certiorari denied. Reported below: 707 F. 2d 516.

No. 83–397. Ouimet Corp. et al. *v.* Pension Benefit Guaranty Corporation et al. C. A. 1st Cir. Certiorari denied. Reported below: 711 F. 2d 1085.

No. 83–398. Mitsui & Co., Ltd., et al. *v.* Industrial Investment Development Corp. et al. C. A. 5th Cir. Certiorari denied. Reported below: 704 F. 2d 785.

No. 83–408. Canadian Hidrogas Resources, Ltd., et al. *v.* MGPC, Inc. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 725 F. 2d 1376.

No. 83–410. Roth *v.* Pritikin et al. C. A. 2d Cir. Certiorari denied. Reported below: 710 F. 2d 934.

No. 83–416. Byrum et al. *v.* Lowe & Gordon, Ltd.; and Byrum et al. *v.* Patterson, Trustee, et al. Sup. Ct. Va. Certiorari denied. Reported below: 225 Va. 362, 302 S. E. 2d 46 (first case).

No. 83–426. Sanchez et al. *v.* McFadden, Administrix of the Estate of McFadden. C. A. 2d Cir. Certiorari denied. Reported below: 710 F. 2d 907.

No. 83–437. Infant Doe *v.* Bloomington Hospital et al. Ct. App. Ind. Certiorari denied.

No. 83–439. Siller et al. *v.* Hartz Mountain Associates et al. Sup. Ct. N. J. Certiorari denied. Reported below: 93 N. J. 370, 461 A. 2d 568.

No. 83–440. Scott *v.* Sylvester. Sup. Ct. Va. Certiorari denied. Reported below: 225 Va. 304, 302 S. E. 2d 30.

No. 83–448. MacDonald et al. *v.* Ferguson Reorganized School District R–2 et al. C. A. 8th Cir. Certiorari denied. Reported below: 711 F. 2d 80.

No. 83–457. Hyde *v.* Mississippi. Sup. Ct. Miss. Certiorari denied.

No. 83–462. Sturm, Ruger & Co., Inc. *v.* Zahrte. C. A. 9th Cir. Certiorari denied. Reported below: 709 F. 2d 26.

No. 83-474. STUART-WESTERN, INC. *v.* COOLING SYSTEMS & FLEXIBLES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 711 F. 2d 1062.

No. 83-488. KOZACHENKO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 708 F. 2d 719.

No. 83-522. WALKER *v.* MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 2d 959.

No. 83-543. KIRK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 711 F. 2d 1069.

No. 83-545. SAGAN *v.* U. S. SUPREME COURT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 716 F. 2d 892.

No. 83-566. WEINER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 723 F. 2d 917.

No. 83-571. ARIAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 708 F. 2d 732.

No. 83-574. EBOLI ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 712 F. 2d 785.

No. 83-584. KRAMER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 711 F. 2d 789.

No. 83-5049. CARPENTER *v.* SCOPPA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 1441.

No. 83-5111. VAN METER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 714 F. 2d 125.

No. 83-5123. WESTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 708 F. 2d 302.

No. 83-5127. GREEN *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 83-5141. DAVIS *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 646 S. W. 2d 871.

No. 83-5179. LARSON *v.* KOTOS ET AL. C. A. 7th Cir. Certiorari denied.

No. 83-5184. AGUIRRE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 83-5198. WILLIAMS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 83-5224. THOMPSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 83-5274. FITZPATRICK *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. Ct. App. N. Y. Certiorari denied. Reported below: 59 N. Y. 2d 916, 453 N. E. 2d 547.

No. 83-5283. HOPKINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 703 F. 2d 1102.

No. 83-5316. OLIVER ET AL. *v.* HUNTINGDON COUNTY COMMISSIONERS ET AL. C. A. 3d Cir. Certiorari denied.

No. 83-5393. DOLLAR ET AL. *v.* HARALSON COUNTY, GEORGIA. C. A. 11th Cir. Certiorari denied. Reported below: 704 F. 2d 1540.

No. 83-5397. ZERMAN *v.* JACOBS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 1443.

No. 83-5404. WEST *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 433 So. 2d 1147.

No. 83-5405. OWENS *v.* BARNES, DAUPHIN COUNTY BUREAU OF ELECTIONS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 711 F. 2d 25.

No. 83-5425. BRUCE *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 707 F. 2d 155.

No. 83-5426. FINCH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 714 F. 2d 134.

No. 83-5428. BENNETT *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari denied.

No. 83-5429. GADDY *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 59 N. Y. 2d 973, 453 N. E. 2d 557.

No. 83-5430. LAMORE *v.* INLAND DIVISION OF GENERAL MOTORS CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 714 F. 2d 140.

No. 83-5434. GUY *v.* TIP TOP, FABERGE, INC. C. A. 8th Cir. Certiorari denied. Reported below: 718 F. 2d 1107.

No. 83-5436. FROST *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 668.

No. 83-5439. HOSKINS *v.* THOMPSON, GOVERNOR OF ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 83-5441. MEARES-EL *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied.

No. 83-5443. ORENSTEIN ET AL. *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 1st Cir. Certiorari denied.

No. 83-5458. CORTEZ *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied.

No. 83-5481. CASTRO *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER FOR BANCO CREDITO Y AHORRO PONCENO, ET AL. C. A. 1st Cir. Certiorari denied.

No. 83-5503. MOORE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 710 F. 2d 731.

No. 83-5515. PINEDA-CHINCHILLA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 712 F. 2d 942.

No. 83-5518. SAMMONS *v.* LIVESAY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 711 F. 2d 1059.

No. 83-5520. PIFER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 716 F. 2d 904.

No. 83-5532. HOLLIMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 714 F. 2d 785.

No. 83-5535. JENKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 714 F. 2d 143.

No. 83-5546. HILLYARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 711 F. 2d 1051.

No. 83-5554. HAMPTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 704 F. 2d 1250.

No. 83-5555. ZYLSTRA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 713 F. 2d 1332.

No. 82-1069. PEACOCK ET AL. *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner Harvey Coleman Peacock for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 654 F. 2d 339 and 686 F. 2d 356.

No. 82-1977. WAINWRIGHT, DIRECTOR, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. *v.* GIARDINO. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 704 F. 2d 1252.

No. 83-144. VINZANT *v.* KING. C. A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 702 F. 2d 18.

No. 82-2148. WHISENHUNT ET VIR *v.* SPRADLIN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 701 F. 2d 470.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

This case raises important and recurring questions concerning the due process and privacy rights of public employees, and I therefore dissent from the denial of certiorari. Petitioners, a patrolwoman and a police sergeant, were suspended from their jobs, and the sergeant was demoted to patrolman, because they dated and spent several nights together. These punishments were imposed even though the Department failed to provide petitioners with any reasonable warning that their conduct was prohibited and did not come forward with any evidence that the activity adversely affected their job performance. The Court of Appeals rejected petitioners' contentions that the suspensions and demotion violated their constitutional rights. *Shawgo* v. *Spradlin*, 701 F. 2d 470 (CA5 1983).

Although issues concerning the regulation of the private conduct of public employees arise frequently, the lower courts have divided sharply both in their results and in their analytic approach,[1] and guidance from this Court is unquestionably needed. I would grant certiorari and set the case for oral argument.

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[1] See, *e. g.*, *Andrade* v. *City of Phoenix*, 692 F. 2d 557 (CA9 1982); *Andrews* v. *Drew Municipal Separate School Dist.*, 507 F. 2d 611 (CA5 1975), cert. dism'd as improvidently granted, 425 U. S. 559 (1976); *Fisher* v. *Snyder*, 476 F. 2d 375 (CA8 1973); *Scott* v. *Macy*, 121 U. S. App. D. C. 205, 349 F. 2d 182 (1965); *Drake* v. *Covington County Board of Education*,

I

Petitioners Janet Shawgo[2] and Stanley Whisenhunt met and began dating while both were with the Amarillo, Tex., Police Department.[3] Whisenhunt was a sergeant who had been on the force for 11 years; Shawgo was a patrolwoman who had joined the Department a year earlier. The two worked different shifts, and Shawgo was not under Whisenhunt's supervision. As their relationship developed, Whisenhunt informed his immediate supervisor, Lieutenant Boydston, that he and Shawgo would probably be spending some nights together. The lieutenant told Whisenhunt that that would be "fine, [but] that I didn't want the two of them setting up housekeeping." Petitioners spent an increasing amount of time together but, as directed by Lieutenant Boydston, maintained separate residences.

Sometime thereafter, respondent Chief of Police Lee Spradlin heard rumors about petitioners' relationship. Without confront-

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371 F. Supp. 974 (MD Ala. 1974) (three-judge court); *Briggs* v. *North Muskegon Police Dept.*, 563 F. Supp. 585 (WD Mich. 1983); *Baron* v. *Meloni*, 556 F. Supp. 796 (WDNY 1983); *Swope* v. *Bratton*, 541 F. Supp. 99 (WD Ark. 1982); *Suddarth* v. *Slane*, 539 F. Supp. 612 (WD Va. 1982); *Shuman* v. *City of Philadelphia*, 470 F. Supp. 449 (ED Pa. 1979); *Wilson* v. *Swing*, 463 F. Supp. 555 (MDNC 1978); *Smith* v. *Price*, 446 F. Supp. 828 (MD Ga. 1977), rev'd on other grounds, 616 F. 2d 1371 (CA5 1980); *Hollenbaugh* v. *Carnegie Free Library*, 436 F. Supp. 1328 (WD Pa. 1977), aff'd, 578 F. 2d 1374 (CA3), cert. denied, 439 U. S. 1052 (1978) (MARSHALL, J., dissenting); *Major* v. *Hampton*, 413 F. Supp. 66 (ED La. 1976); *Mindel* v. *U. S. Civil Service Comm'n*, 312 F. Supp. 485 (ND Cal. 1970). See also *Phillips* v. *Bergland*, 586 F. 2d 1007, 1011 (CA4 1978); *Norton* v. *Macy*, 135 U. S. App. D. C. 214, 217, 417 F. 2d 1161, 1164 (1969); *Meehan* v. *Macy*, 129 U. S. App. D. C. 217, 229–230, 232, 392 F. 2d 822, 834–835, 837 (1968), on reconsideration, 138 U. S. App. D. C. 38, 425 F. 2d 469, on rehearing en banc, 138 U. S. App. D. C. 41, 425 F. 2d 472 (1969); *Taylor* v. *U. S. Civil Service Comm'n*, 374 F. 2d 466, 469–470 (CA9 1967).

[2] Subsequent to the decision below, petitioners were married and Shawgo has adopted her husband's last name. For convenience, Mrs. Whisenhunt will be referred to herein by her previous name.

[3] The statement of facts is adopted from the opinion of the Court of Appeals. *Shawgo* v. *Spradlin*, 701 F. 2d 470, 472–474 (CA5 1983).

ing them or their supervisors, Spradlin ordered Department detectives to conduct surveillance of the two police officers during off-duty hours. For 17 days, the detectives monitored Whisenhunt's home from a car parked in front of it and from a nearby apartment rented for that purpose. During that period, they observed Shawgo entering and leaving Whisenhunt's apartment on a number of occasions. The detectives filed an investigative report with Chief Spradlin which detailed the times of Shawgo's off-duty visits but also noted that petitioners had maintained separate residences.

On the Chief's recommendation, the Department disciplined petitioners for their nonmarital "cohabitation." Both were suspended without pay for 12 days; in addition, Whisenhunt was demoted from sergeant to patrolman. When notified of the punishments, petitioners were informed that their relationship violated § 113, Part 8, of Police Department regulations, which prohibits conduct that, "if brought to the attention of the public, could result in justified unfavorable criticism of [an officer] or the department." Whisenhunt was told that his activities also violated § 123 of the regulations, which requires "diligent and competent" performance of duties that are not "otherwise specifically prescribed" in the rules, as well as city personnel Rule XIX, § 108, which proscribes "conduct prejudicial to good order." No Amarillo police officer had ever before been disciplined for dating or "cohabitation" on these or any other grounds.

Petitioners exercised their statutory right to challenge the discipline before the Amarillo Civil Service Commission. The Commission refused to hear evidence of other known but unpunished instances of dating and cohabitation among members of the Police Department. There were no charges, evidence, or findings that the relationship violated any state law;[4] that it affected the performance of petitioners' duties; or that it was known to any members of the public. The Commission nevertheless upheld the discipline. Both officers subsequently resigned from the force because of unsatisfactory working conditions created by the discipline and publicity resulting from the hearing.

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[4] The Texas Penal Code expressly excludes from its sexual offense provisions "the conduct of persons while cohabitating, regardless of the legal status of their relationship and of whether they hold themselves out as husband and wife." Tex. Penal Code Ann. § 21.12 (1974). In addition, Texas has no statute prohibiting fornication.

Petitioners brought this action in Federal District Court under 42 U. S. C. § 1983 against Chief Spradlin, the city, the Police Department, and members of the Amarillo Civil Service Commission. The complaint alleged that the discipline violated petitioners' rights to privacy and to due process of law. After a trial, the District Court entered judgment in favor of the defendants in an unpublished opinion and the Court of Appeals affirmed. *Shawgo* v. *Spradlin*, 701 F. 2d 470 (CA5 1983).

II

Petitioners contend that, since they had no way of knowing that their private and otherwise lawful behavior violated the regulations quoted above, the discipline was imposed without due process of law. The Court of Appeals characterized this claim as "extremely persuasive":

> "[Whisenhunt] did not receive warning of the consequences of off-duty behavior that was a common practice at the Department and was expressly or tacitly approved by his supervisor. The actual conduct for which he was punished—dating and spending the night with a co-employee—is not self-evidently within the ambit of the regulations and thus does not carry with it its own warning of wrongdoing, as does illegal conduct . . . . In addition, the plaintiff here had no objective indication that his off-duty activities impaired his job effectiveness.
>
> "Moreover, the catchall regulation had not been given content by prior instances of discipline, for 'the conduct resulting in their suspension was virtually identical to conduct previously tolerated.' . . . The plaintiff had no notice, because he was the first officer disciplined for activities that were approved by his supervisor and that he had valid reasons to believe were common in the police force. In addition, by knowingly tolerating similar activities by other individuals, the Department may be seen as sanctioning conduct that could have fallen within the scope of the rule. . . . Whisenhunt's supervisor's express or tacit approval, the implicit sanctioning of similar behavior in the Department, and the absence of warnings or prior instances of punishment, all raised a reason-

> able inference contradictory to the scope later ascribed to the general rule." *Id.*, at 478 (citations omitted).

Despite this conclusion, the Court of Appeals held that the rules afforded petitioners constitutionally sufficient notice that their conduct was prohibited. The court apparently believed that, in cases not involving criminal sanctions, formal administrative rulemakings, or activities protected by the First Amendment, the Due Process Clause imposes virtually no requirement of fair warning. See *id.*, at 477–478, 479.

I believe this assumption fundamentally misperceives the purpose of the due process notice requirement. We have long recognized that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *General Construction Co.*, 269 U. S. 385, 391 (1926). See also *Kolender* v. *Lawson*, 461 U. S. 352, 357–358 (1983). The requirement that the government afford reasonable notice of the kinds of conduct that will result in deprivations of liberty and property[5] reflects a sense of basic fairness as well as concern for the intrinsic dignity of human beings. Furthermore, the rule is instrumental to the constitutional concept of "ordered liberty." By demanding that government articulate its aims with a reasonable degree of clarity, the Due Process Clause ensures that state power will be exercised only on behalf of policies reflecting a conscious choice among competing social values; reduces the danger of caprice and discrimination in the administration of the laws; and permits meaningful judicial review of state actions. See, *e. g.*, *Grayned* v. *City of Rockford*, 408 U. S. 104, 108–109 (1972); *Giaccio* v. *Pennsylvania*, 382 U. S. 399, 402–404 (1966); *Raley* v. *Ohio*, 360 U. S. 423, 437–439 (1959); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 532 (1952) (Frankfurter, J., concurring); *Cantwell* v. *Connecticut*, 310 U. S. 296, 307–308 (1940); *Hurtado* v. *California*, 110 U. S. 516, 535–536 (1884). See generally *McGautha* v. *California*, 402 U. S. 183, 248–259 (1971) (BRENNAN, J., dissenting), and cases cited therein; Note, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 80–81 (1960).

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[5] The Court of Appeals recognized that Whisenhunt, at least, was deprived of a constitutionally protected property interest when he was demoted from sergeant to patrolman. 701 F. 2d, at 476. See also *infra*, at 971–972.

The concern with arbitrary encroachments on freedom which underlies the notice requirement naturally has special force when the liberty interests at stake are fundamental. For this reason, we have demanded greater precision in laws which render conduct criminal or which may abridge First Amendment rights. See, *e. g., Kolender* v. *Lawson, supra,* at 358, and n. 8; *Parker* v. *Levy,* 417 U. S. 733, 756 (1974); *Smith* v. *Goguen,* 415 U. S. 566, 573, n. 10 (1974); *Winters* v. *New York,* 333 U. S. 507, 515 (1948). See *infra,* at 971. But the protections of the Due Process Clause are not limited to the most severe deprivations of liberty and property. As the Court held long ago, the requirement of fair warning does not prohibit particular types of penalties but rather "exaction of obedience to a rule or standard which [is] so vague and indefinite as really to be no rule or standard at all." *A. B. Small Co.* v. *American Sugar Refining Co.,* 267 U. S. 233, 239 (1925). Following the principle of *A. B. Small,* we have frequently entertained claims that regulations of economic and professional activity are unconstitutionally vague, even when the law at issue depends on civil enforcement and has no apparent effect on First Amendment rights. See, *e. g., Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.,* 455 U. S. 489, 497–505 (1982); *Joseph E. Seagram & Sons, Inc.* v. *Hostetter,* 384 U. S. 35, 48–49 (1966); *Barsky* v. *Board of Regents,* 347 U. S. 442, 443, 448 (1954); *Neblett* v. *Carpenter,* 305 U. S. 297, 302–303 (1938).

The unexpected and ad hoc application of the city of Amarillo's vague personnel regulations to petitioners' conduct implicates precisely the concerns underlying the due process requirement of fair warning. There is not the slightest hint in either the language or the prior interpretations of the city's rules that they forbid private, off-duty, lawful, and consensual sexual relations. Whatever policy reasons may have justified the discipline, they had apparently never before been expressed by either the State, the city, or the Police Department. Indeed, as the Court of Appeals explained, petitioners had good reasons to believe that their relationship was *not* so proscribed. Upholding the discipline, therefore, is not merely unfair, it "sanction[s] the most indefensible sort of entrapment by the State." *Raley* v. *Ohio, supra,* at 438.

III

For these reasons, I believe the discipline imposed on petitioners would have failed to satisfy the requirements of fair notice even if no fundamental rights had been at stake. But petitioners' lawful, off-duty sexual conduct clearly implicates the "fundamental . . . right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Stanley* v. *Georgia*, 394 U. S. 557, 564 (1969). Without identifying the precise contours of this right, we have recognized that it includes a broad range of private choices involving family life and personal autonomy. See, *e. g.*, *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 426–427 (1983) (abortion); *Santosky* v. *Kramer*, 455 U. S. 745, 753 (1982) (child raising); *Zablocki* v. *Redhail*, 434 U. S. 374, 383–385 (1978) (marriage); *Carey* v. *Population Services International*, 431 U. S. 678, 684–685 (1977) (contraception); *Moore* v. *City of East Cleveland*, 431 U. S. 494, 499 (1977) (plurality opinion) (right to determine family living arrangements); *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632, 639–640 (1974) (pregnancy); *Roe* v. *Wade*, 410 U. S. 113, 152–153 (1973) (abortion); *Eisenstadt* v. *Baird*, 405 U. S. 438, 453–454 (1972) (contraception); *id.*, at 460, 463–465 (White, J., concurring in result); *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967) (marriage); *Griswold* v. *Connecticut*, 381 U. S. 479, 483–486 (1965) (marital privacy); *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944) (family relationships); *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 541–542 (1942) (procreation); *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925) (child rearing and education); *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923) (same). These and other cases reflect the view that constitutionally protected liberty includes freedom from governmental disclosure of or interference with certain kinds of intensely personal decisions. The intimate, consensual, and private relationship between petitioners involved both the "interest in avoiding disclosure of personal matters, and . . . the interest in independence in making certain kinds of important decisions," *Whalen* v. *Roe*, 429 U. S. 589, 599–600 (1977), that our cases have recognized as fundamental. Therefore, the notice requirement of the Due Process Clause demands particular precision in this case. See *supra*, at 970.

Indeed, because petitioners' conduct involved fundamental rights, it could only be abridged to the extent necessary to achieve strong, clearly articulated state interests. See, *e. g.*, *Akron* v. *Akron Center for Reproductive Health, Inc.*, *supra*, at 427. The Court of Appeals concluded that petitioners' punishment served a hypothesized interest in "forbidding members of a quasi-military unit, especially those different in rank, to share an apartment or to cohabit." 701 F. 2d, at 483. Even assuming that this concern is sufficiently compelling to support explicit regulation of petitioners' off-duty sexual activities,[6] the city's deterrent purposes obviously cannot be rationally served by regulations that fail to warn officers that such conduct is forbidden. Cf. *Kelley* v. *Johnson*, 425 U. S. 238, 239, n. 1, 247–248 (1976) (promulgation of explicit rule regulating police officers' hairstyles is rationally related to goal of making officers readily recognizable and inculcating esprit de corps); *Arnett* v. *Kennedy*, 416 U. S. 134, 160 (1974) (opinion of REHNQUIST, J.) (longstanding constructions and availability of official interpretations gave content to personnel regulations).

Public employers in general, and police departments in particular, may well deserve considerable latitude in enforcing codes of conduct. See *Arnett* v. *Kennedy*, *supra;* *Parker* v. *Levy*, 417 U. S. 773 (1974). It is hard to understand, however, how such a code can be either fairly or effectively enforced when employees are not told the standards of conduct to which they are expected to conform.

No. 82–6780. McILWAIN *v.* UNITED STATES; and

No. 82–6997. HINES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 454 A. 2d 770.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

I

Petitioners, convicted of second-degree burglary while armed, challenge their convictions on the ground that they were denied due process and the right to an impartial jury in violation of the Fifth and Sixth Amendments to the United States Constitution. Their claims stem from the fact that the deliberations of the jury that convicted them were disrupted by the intoxication of the foreman of the jury. On the second day of deliberations, Friday, July 23, 1981, the trial judge received a note from members of the jury stating that they "'would like to change the foreperson of the jury due to the fact that the present foreperson seems somewhat unable to preside this morning.'" *Lee* v. *United States*, 454 A. 2d 770, 772 (D. C. 1982). That morning, prior to receiving the note, the judge's chambers had received a call indicating that the foreman of the jury would be late. In addition, a marshal suggested to the judge that there might be some question as to whether one of the jurors was intoxicated.

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[6] As noted above, Whisenhunt was not Shawgo's supervisor.

The trial judge held a separate *voir dire* of each member of the jury. The foreman of the jury denied any intoxication, and one juror stated that there was no indication that the foreman had been drinking. Nine members of the jury stated that it was their belief that the foreman had been drinking. Their estimation of her degree of intoxication varied from observations that she appeared to be "a little intoxicated" to claims that she was flatly "drunk."[1]

At the conclusion of the *voir dire* the trial court suggested that the petitioners agree to an arrangement whereby the foreman of the jury would be dismissed and the case would be submitted to the remaining 11 jurors. Petitioners rejected that suggestion and proposed instead that the judge declare a mistrial. The trial judge acknowledged that the juror in question was "somewhat under the influence in a fashion . . . that makes deliberations . . . inappropriate at this time." Pet. for Cert. of McIlwain 11. But the judge nonetheless denied the motion for a mistrial. Instead, he ordered an immediate 3-day recess, noting his hope that the "offending juror [would be] perfectly sober and able to deliberate" on Monday when deliberations would resume. *Lee* v. *United States*, 454 A. 2d, at 773. The judge expressly asked the juror to "come back on Monday refreshed." *Ibid.* Before the jury resumed deliberations on Monday, the trial judge "look[ed] in" on the jurors and informed counsel that he detected no further disability. *Ibid.* The jury acquitted the petitioners of armed robbery but convicted them of second-degree burglary while armed.

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[1] "JUROR CURLEY: I will tell it like it is. It seems like she is a little intoxicated. . . .

"JUROR FRAZIER: As far as I am concerned, she had been drinking this morning, Your Honor. . . .

"JUROR TYSON: She is not herself. She is just talking a lot . . . I assume she is under the influence of some kind. . . .

"JUROR FORD: I thought she was incompetent to preside because of the fact that she was a little intoxicated. . . .

"JUROR FLYNN: She did look like she was under the influence of alcohol . . . I do not think she should be a juror on this this morning. . . .

"JUROR JACKSON: She seemed to be under the influence of alcohol, sir . . . I think she still is a little intoxicated, unreasonable . . .

"JUROR WATSON: Well, it seemed like she had been drinking and she wouldn't let anyone else talk; just difficult to accomplish anything. . . .

"JUROR HUNTER: To my knowledge I think she had just a little too much to drink to be in this position that we are in . . .

"JUROR WALL: She is drunk. . . ." Pet. for Cert. of McIlwain 9.

The District of Columbia Court of Appeals affirmed the petitioners' convictions on the ground that they had failed to show that they were prejudiced by the juror's intoxication. Justifying this conclusion, the Court of Appeals observed:

> "[O]nly one juror was involved, and only a short period of the deliberations was called into question. There is no evidence that any drinking actually occurred in the jury room or during the course of the trial, and the jury foreperson was not conclusively shown to have been intoxicated at the time of *voir dire*. The recess, coupled with the judge's checking in on the jury on Monday, both of which were done with the concurrence of appellants' counsel, foreclosed the possibility of prejudice. Under these circumstances, it cannot reasonably be said that the appellants were substantially deprived of their right to the judgment of objective and competent jurors." *Id.*, at 774.

This Court should grant certiorari and review the Court of Appeals' decision because it raises serious questions regarding the standard to be applied in determining the conditions under which a juror's misconduct and incapacity deprive a defendant of his Fifth Amendment right to due process and his Sixth Amendment right to an impartial jury.

II

This Court has repeatedly insisted in a wide variety of contexts that the right to be tried before a jury capable and willing to decide a case solely on the evidence before it is a cornerstone of our criminal justice system. See, *e. g., Irvin* v. *Dowd*, 366 U. S. 717 (1961). This precious right is denigrated when a conviction resting upon deliberations tainted by a juror's gross and debilitating impropriety is allowed to stand.

The issue of juror misconduct usually involves allegations of juror bias. Here, however, the complaint is not that the juror in question was biased against the petitioners. Rather, the complaint is that the juror's drunkeness rendered her incompetent and that a necessary corollary of the right to an impartial jury is the right to a jury in which all of the members are mentally competent. This Court as well as other courts have recognized the right to a mentally competent jury. See, *e. g., Jordan* v. *Massachusetts*, 225 U. S. 167, 176 (1912); *Sullivan* v. *Fogg*, 613 F. 2d 465 (CA2 1980) (trial before jury with an insane juror inconsistent with due process).

It is undisputed that one of the members of the jury—the person chosen to be its foreman—was inebriated during at least part of the deliberations.[2] The trial judge specifically found that the juror was "somewhat under the influence," and recessed the trial so that the offending juror would be able to deliberate after a 3-day respite. The extent of the juror's incapacitation is highlighted by the trial judge's suggestion that he simply dismiss her and allow the remaining jurors to decide the case on their own.

The Court of Appeals finds comfort in the fact that "only" one juror was intoxicated. Yet "only" one juror may be the difference between liberty and imprisonment. Due process requires that *every* member of a jury meet minimal requirements of mental competence and impartiality. The Court of Appeals also finds it relevant that "only a short period of the deliberations was called into question." 454 A. 2d, at 774. But the Court of Appeals cites no facts and gives no reasons which support the notion that the affected period of deliberations was insignificant. Given the delicate dynamics of jury deliberations, it is simply impossible to know the effects the intoxicated juror had on her fellow jurors. Common sense would seem to indicate, however, that the general effect would not be conducive to the careful and objective deliberations upon which our criminal justice system relies.

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[2] Although the Court of Appeals asserted that there is no evidence that drinking occurred during the course of the trial, two jurors indicated that the offending juror had been drinking during the trial, prior to the day she was examined by the judge. See *Lee* v. *United States*, 454 A. 2d 770, 772–773 (D. C. 1982); Pet. for Cert. of McIlwain 10–11.

In defending the decision of the Court of Appeals, the Government strongly relies upon this Court's holding in *Smith* v. *Phillips*, 455 U. S. 209 (1982). *Smith* involved allegations that a defendant had been denied due process because, during his state-court trial, one of the jurors applied to the prosecutor's office for a job as an investigator. The prosecutor learned of the application during the trial but failed to disclose this information until after the jury had convicted the defendant. The state court conducted a post-trial evidentiary hearing and determined that the juror was not actually biased. The Federal District Court, affirmed by the Court of Appeals, granted habeas corpus relief to the defendant on the ground that the juror's action had deprived the defendant of his constitutional right to an impartial jury. This Court reversed, holding that the post-trial evidentiary hearing provided sufficient protection for the defendant. Establishing a new standard by which to determine disputes over the integrity of jury deliberations, the majority of this Court declared that "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Id.*, at 215.

Smith is a flawed ruling for reasons I have previously articulated. *Smith* v. *Phillips*, 455 U. S., at 224–244 (MARSHALL, J., dissenting). It misrepresents the factual circumstances of the incident that was at issue. *Id.*, at 229. It constitutes a departure from the mainstream of this Court's decisions concerning the integrity of jury deliberations. Cf. *Peters* v. *Kiff*, 407 U. S. 493, 502 (1972) (opinion of MARSHALL, J.) ("[E]ven if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias"). It posits a standard for challenging juror misconduct that is unrealistically demanding since proof of actual bias is virtually impossible to discover. *Smith* v. *Phillips*, *supra*, at 230–232. In sum, *Smith* was wrongly decided, exerts a baleful influence over this Court's consideration of analogous cases, and should be reconsidered.

Due process requires far more protection against juror misconduct than the "actual bias" test mandated by *Smith*. With respect to the cases at bar, due process may well require the granting of a mistrial whenever a trial judge finds that a juror, already engaged in deliberations, is so drunk that the deliberations must be recessed. This rule would undoubtedly affect very few trials; drunkenness on the part of active jurors is certainly an aberration. As to objections that this *per se* rule would create inconvenience and pose a drain on judicial resources, the only response is that such costs are what we must pay in order to give more than lip-service to our claim that trial by an impartial and competent jury constitutes a "priceless" right. See *Irvin* v. *Dowd*, *supra*, at 721. Because these cases present important issues implicating the constitutional right to a fair trial, I would grant the petitions.

No. 83-97. NEVADA, BY AND THROUGH THE WELFARE DIVISION OF THE DEPARTMENT OF HUMAN RESOURCES *v.* VINE ET AL. Sup. Ct. Nev. Motion of respondent John Michael Vine for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 99 Nev. 278, 662 P. 2d 295.

No. 83-300. CITY OF LOS ANGELES DEPARTMENT OF WATER AND POWER *v.* NATIONAL AUDUBON SOCIETY ET AL. Sup. Ct. Cal. Certiorari denied. JUSTICE REHNQUIST took no part in the consideration or decision of this petition. Reported below: 33 Cal. 3d 419, 658 P. 2d 709.

No. 83-434. FOOLS CROW ET AL. *v.* GULLET ET AL. C. A. 8th Cir. Motions of Christic Institute et al. and American Civil Liberties Union et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 706 F. 2d 856.

No. 83-465. RONWIN *v.* SUPREME COURT OF ARIZONA. Sup. Ct. Ariz. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 136 Ariz. 566, 667 P. 2d 1281.

No. 83-5153. HILL *v.* MISSISSIPPI. Sup. Ct. Miss.;
No. 83-5389. MINCEY *v.* GEORGIA. Sup. Ct. Ga.;
No. 83-5406. BUNCH *v.* VIRGINIA. Sup. Ct. Va.; and
No. 83-5567. WATERHOUSE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 83-5153, 432 So. 2d 427; No. 83-5389, 251 Ga. 255, 304 S. E. 2d 882; No. 83-5406, 225 Va. 423, 304 S. E. 2d 271; No. 83-5567, 429 So. 2d 301.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth

and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 82–1946. OYSTER *v.* OYSTER, *ante*, p. 801;

No. 82–1991. SCHWARZ *v.* COASTAL RESOURCES MANAGEMENT ET AL., *ante*, p. 823;

No. 82–6550. MULLEN *v.* STARR ET AL., 461 U. S. 960;

No. 82–6676. HANNAN *v.* SECRETARY OF THE ARMY ET AL., *ante*, p. 833;

No. 82–6971. HARTFORD *v.* ARIZONA, *ante*, p. 842;

No. 82–7033. PANTER ET AL. *v.* MILLER ET AL., *ante*, p. 845;

No. 83–5. POLSKIE LINIE LOTNICZE (LOT POLISH AIRLINES) *v.* ROBLES ET AL., *ante*, p. 845;

No. 83–93. GEE *v.* FUNG ET AL., *ante*, p. 849;

No. 83–5114. STEVENSON *v.* CONRAD, *ante*, p. 857;

No. 83–5143. HOLLAND *v.* GUEST QUARTERS, *ante*, p. 858;

No. 83–5228. ALEXANDER *v.* ZEANAH ET AL., *ante*, p. 861; and

No. 83–5254. WRIGHT *v.* NEW YORK LIFE INSURANCE CO., *ante*, p. 862. Petitions for rehearing denied.

NOVEMBER 8, 1983

Dismissal Under Rule 53

No. 83–544. DOE *v.* UNITED STATES. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 714 F. 2d 347.

NOVEMBER 14, 1983

Appeals Dismissed

No. 83–405. INDIANA UNIVERSITY FOUNDATION ET AL. *v.* REED ET AL. Appeal from Sup. Ct. Kan. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 233 Kan. 531, 664 P. 2d 824.

No. 83–531. GAUNCE *v.* DEVINCENTIS ET AL. Appeal from C. A. 7th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 708 F. 2d 1290.

No. 83–5446. Tatu et al. *v.* Davis et al. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83–5460. Betka *v.* City of West Linn et al. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded. (See also No. 83–118, *ante*, p. 67.)

No. 83–253. Moya *v.* United States. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Place*, 462 U. S. 696 (1983). Reported below: 704 F. 2d 337.

No. 83–453. National Labor Relations Board *v.* United Parcel Service, Inc. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *NLRB* v. *Transportation Management Corp.*, 462 U. S. 393 (1983). Reported below: 706 F. 2d 972.

No. 83–460. United States *v.* McManigal. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Russello* v. *United States*, *ante*, p. 16. Reported below: 708 F. 2d 276.

Vacated and Remanded After Certiorari Granted

No. 82–1925. United States Department of State et al. *v.* Washington Post Co. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 812.] Judgment vacated and case remanded to the Court of Appeals with directions that it instruct the United States District Court for the District of Columbia to dismiss the complaint as moot.

Miscellaneous Orders

No. A–233 (83–711). Nifong *v.* United States. C. A. 4th Cir. Application for stay, addressed to Justice Brennan and referred to the Court, denied.

No. D–361. In re Disbarment of Moore. Disbarment entered. [For earlier order herein, see 462 U. S. 1114.]

No. D–388. In re Disbarment of Goldburn. It is ordered that Glenn Jermaine Goldburn, of Rockville, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 82–1295. Escambia County, Florida, et al. *v.* McMillan et al. C. A. 5th Cir. [Probable jurisdiction noted, 460 U. S. 1080.] Motion of Lawyers' Committee for Civil Rights Under Law for leave to file a brief as *amicus curiae* granted. Motion of appellants for an order maintaining status quo denied.

No. 82–1453. Badaracco et al. *v.* Commissioner of Internal Revenue; and

No. 82–1509. Deleet Merchandising Corp. *v.* United States. C. A. 3d Cir. [Certiorari granted, 461 U. S. 925.] Motion of petitioners in No. 82–1453 for leave to file motion for divided argument out of time denied.

No. 82–1474. Hoover et al. *v.* Ronwin et al. C. A. 9th Cir. [Certiorari granted, 461 U. S. 926.] Motion of Maryland for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied. Justice O'Connor took no part in the consideration or decision of this motion.

No. 83–56. Heckler, Secretary of Health and Human Services *v.* Community Health Services of Crawford County, Inc., et al. C. A. 3d Cir. [Certiorari granted, *ante*, p. 812.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 83–95. Patton et al. *v.* Yount. C. A. 3d Cir. [Certiorari granted, *ante*, p. 913.] Motion of respondent for appointment of counsel granted, and it is ordered that George E. Schumacher, Esquire, of Pittsburgh, Pa., be appointed to serve as counsel for respondent in this case.

No. 83–5338. Anderson *v.* Virginia. Sup. Ct. Va. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until December 5, 1983, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co., ante*, p. 928, we would deny the petition for certiorari in this case without reaching the merits of the motion to proceed *in forma pauperis*.

No. 82–7027. IN RE ABNEY. Petition for writ of mandamus denied.

Certiorari Granted

No. 83–264. BURNETT ET AL. *v.* GRATTAN ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 710 F. 2d 160.

No. 83–103. WOODKRAFT DIVISION, GEORGIA KRAFT CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 11th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 696 F. 2d 931.

Certiorari Denied. (See also Nos. 83–405, 83–531, 83–5446, and 83–5460, *supra.*)

No. 82–1885. TERRAMAR BEACH COMMUNITY IMPROVEMENT ASSN., INC. *v.* CARRITHERS ET AL. Sup. Ct. Tex. Certiorari denied. Reported below: 645 S. W. 2d 772.

No. 82–1990. AUSTIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1509.

No. 82–1993. JOINER *v.* VASQUEZ. Ct. App. Tex., 5th Sup. Jud. Dist. Certiorari denied. Reported below: 632 S. W. 2d 755.

No. 82–2147. INTERNATIONAL ASSOCIATION OF HEAT & FROST INSULATORS & ASBESTOS WORKERS, LOCAL 17 *v.* YOUNG ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 703 F. 2d 572.

No. 82–6777. WOODS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 701 F. 2d 188.

No. 83–6906. KERNS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 711 F. 2d 1060.

No. 83–3. BAGINSKY *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 697 F. 2d 1070.

No. 83-9. NEW MEXICO EX REL. "ONE MINUTE OF SILENCE" STATUTE ET AL. *v.* BURCIAGA, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO. C. A. 10th Cir. Certiorari denied.

No. 83-106. H. M. TRIMBLE & SONS, LTD. *v.* KINGSLEY & KEITH (CANADA) LTD. ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 500 Pa. 371, 456 A. 2d 1333.

No. 83-189. LEWALLEN ET AL. *v.* KENTUCKY. Cir. Ct. Ky., Campbell County. Certiorari denied.

No. 83-233. COLORADO RIVER INDIAN TRIBES *v.* ARANSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 696 F. 2d 654.

No. 83-260. PETTINEO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 666.

No. 83-263. FOGLE *v.* SUPREME COURT OF SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 279 S. C. 131, 303 S. E. 2d 90.

No. 83-279. PIUS XII ACADEMY, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 711 F. 2d 1058.

No. 83-310. RUZICKA *v.* GENERAL MOTORS CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 707 F. 2d 259.

No. 83-347. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION *v.* DYAS. C. A. 8th Cir. Certiorari denied. Reported below: 705 F. 2d 993.

No. 83-472. ATCHISON *v.* CAREER SERVICE COUNCIL OF WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 664 P. 2d 18.

No. 83-477. EARLE M. JORGENSEN CO. ET AL. *v.* CITY OF SEATTLE, WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 99 Wash. 2d 861, 665 P. 2d 1328.

No. 83-486. THOMPSON *v.* MOORMAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1509.

No. 83-489. KAZANZAS *v.* WALT DISNEY WORLD CO. C. A. 11th Cir. Certiorari denied. Reported below: 704 F. 2d 1527.

No. 83-500. HARTKE *v.* MCKELWAY. C. A. D. C. Cir. Certiorari denied. Reported below: 228 U. S. App. D. C. 139, 707 F. 2d 1544.

No. 83-501. HAYES *v.* CITY OF BATON ROUGE. 19th Jud. Dist. Ct. La., East Baton Rouge Parish. Certiorari denied.

No. 83-503. RIPPETOE *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 437 So. 2d 383.

No. 83-505. ELECTRONIC CURRENCY CORP. ET AL. *v.* WESTERN STATES BANKCARD ASSN. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 703 F. 2d 574.

No. 83-515. BENALLY ET AL. *v.* UNC RESOURCES, INC., ET AL. C. A. 10th Cir. Certiorari denied.

No. 83-517. CHOCALLO *v.* BUREAU OF HEARINGS AND APPEALS, SOCIAL SECURITY ADMINISTRATION, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 716 F. 2d 889.

No. 83-569. HAGEMAN *v.* HOME INSURANCE CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1430.

No. 83-622. ZUNIGA ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 714 F. 2d 632.

No. 83-626. KLEINMAN ET UX. *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied.

No. 83-5030. DANIELS *v.* MINTZES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 714 F. 2d 139.

No. 83-5043. RHODES *v.* STEWART, TRUSTEE IN BANKRUPTCY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 159.

No. 83-5058. SHARP *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 83-5105. FIELDS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 709 F. 2d 1518.

No. 83-5176. ZAZUETA-LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 711 F. 2d 1067.

No. 83-5177. WHITTINGTON *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 704 F. 2d 1418.

No. 83-5192. HEALY *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 706 F. 2d 698.

No. 83-5204. GUIGNO ET AL. *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 706 F. 2d 407.

No. 83-5396. MOSLEY *v.* SMITH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 716 F. 2d 897.

No. 83-5399. HOLMES *v.* KING, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 709 F. 2d 965.

No. 83-5447. REDMAN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 706 F. 2d 316.

No. 83-5450. SCHWARTZ *v.* MAIDEN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 1443.

No. 83-5452. MCCURDY *v.* LANDMARK FINANCIAL CORPORATION OF GEORGIA ET AL. C. A. 11th Cir. Certiorari denied.

No. 83-5455. SMITH *v.* MORRIS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 714 F. 2d 154.

No. 83-5456. MINGO *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 83-5459. STINSON *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 710 F. 2d 743.

No. 83-5461. GREEN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 433 So. 2d 146.

No. 83-5466. ROBINSON *v.* WARDEN, MARYLAND STATE PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 714 F. 2d 133.

No. 83-5467. MORENO *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 83-5468. PHILLIPS *v.* ALONZO ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 435 So. 2d 1266.

No. 83-5471. MORGAN *v.* ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 83-5476. JOHN *v.* WILKINSON, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 716 F. 2d 890.

No. 83-5478. WASHINGTON ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 716 F. 2d 893.

No. 83-5480. RESEBURG *v.* TEXAS. Ct. App. Tex., 12th Sup. Jud. Dist. Certiorari denied. Reported below: 656 S. W. 2d 84.

No. 83-5485. ASHBY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 83-5486. DUGAR *v.* MAGGIO, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 710 F. 2d 836.

No. 83-5487. ROBY *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 233 Kan. 1093.

No. 83-5489. CHRISTIANSEN *v.* TEXAS. C. A. 5th Cir. Certiorari denied.

No. 83-5491. BROWN *v.* DOUGLAS, JUDGE. C. A. 4th Cir. Certiorari denied. Reported below: 714 F. 2d 128.

No. 83-5499. MAYES *v.* SOWDERS, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 716 F. 2d 903.

No. 83-5519. POWELL *v.* NUTH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 707 F. 2d 509.

No. 83-5521. CENICEROS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 708 F. 2d 719.

No. 83-5522. JONES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 716 F. 2d 893.

No. 83-5529. CSERENYI ET AL. *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 96 App. Div. 2d 538, 465 N. Y. S. 2d 99.

No. 83-5531. GOODRIDGE *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 714 F. 2d 162.

No. 83–5556. SALSER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 709 F. 2d 715.

No. 83–5557. JONES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 714 F. 2d 125.

No. 83–5558. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 711 F. 2d 748.

No. 83–5580. CARTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 668.

No. 83–5584. CHERNACK *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 720 F. 2d 657.

No. 83–5587. MANSAW *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 714 F. 2d 785.

No. 83–5592. WEBBER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 712 F. 2d 1316.

No. 83–5595. AMBROSE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 707 F. 2d 1209.

No. 83–5598. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 715 F. 2d 1164.

No. 83–153. FAULKNER ET AL. *v.* MERRITT. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 697 F. 2d 761.

No. 83–483. HYDROCULTURE, INC. *v.* COOPERS & LYBRAND. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 711 F. 2d 1063.

No. 83–5339. DICK *v.* KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Sup. Ct. Ga.;
No. 83–5367. MOORE *v.* LOUISIANA. Sup. Ct. La.;
No. 83–5449. RICHMOND *v.* ARIZONA. Sup. Ct. Ariz.;
No. 83–5454. WOMACK *v.* ALABAMA. Sup. Ct. Ala.;
No. 83–5457. JERNIGAN *v.* TEXAS. Ct. Crim. App. Tex.; and
No. 83–5463. ELLEDGE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 83–5367, 432 So. 2d 209; No. 83–5449, 136 Ariz. 312, 666 P. 2d 57; No. 83–5454, 435 So. 2d 766; No. 83–5457, 661 S. W. 2d 936; No. 83–5463, 432 So. 2d 35.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 83–5438. LEWIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 714 F. 2d 148.

Rehearing Denied

No. 82–6255. SMITH, AKA EL-AMIN *v.* GOVERNMENT OF THE VIRGIN ISLANDS, *ante*, p. 831;

No. 82–6888. KAPLAN *v.* OFFICE OF THE U. S. ATTORNEY FOR THE DISTRICT OF NEW JERSEY ET AL., *ante*, p. 839;

No. 82–6960. CLARK *v.* MARSTON ET AL., *ante*, p. 874;

No. 83–53. CHESAPEAKE & OHIO RAILWAY CO. *v.* SCHAAF, *ante*, p. 848;

No. 83–5107. BROWN *v.* LUTHERAN HOSPITAL SOCIETY OF SOUTHERN CALIFORNIA, DBA SANTA MONICA HOSPITAL MEDICAL CENTER, *ante*, p. 856; and

No. 83–5244. TUCKER *v.* LONDON GOLD EXCHANGE, *ante*, p. 897. Petitions for rehearing denied.

NOVEMBER 28, 1983

Appeals Dismissed

No. 83–451. WILSON *v.* COMMISSIONER OF INTERNAL REVENUE. Appeal from C. A. 10th Cir. dismissed for want of jurisdiction.

No. 83–534. FARBER *v.* OREGON. Appeal from Sup. Ct. Ore. dismissed for want of substantial federal question. Reported below: 295 Ore. 199, 666 P. 2d 821.

No. 83–535. MARSHFIELD FAMILY SKATELAND, INC., ET AL. *v.* TOWN OF MARSHFIELD. Appeal from Sup. Jud. Ct. Mass. dismissed for want of substantial federal question. JUSTICE BRENNAN and JUSTICE WHITE would note probable jurisdiction and set case for oral argument. Reported below: 389 Mass. 436, 450 N. E. 2d 605.

No. 83–555. RUSSELL STOVER CANDIES, INC. *v.* DEPARTMENT OF REVENUE OF MONTANA. Appeal from Sup. Ct. Mont. dismissed for want of substantial federal question. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: —— Mont. ——, 665 P. 2d 198.

No. 83–561. MORETTI ET AL. *v.* MULTI-PAK CORP. ET AL. Appeal from Super. Ct. N. J., App. Div., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Reversed and Remanded. (See No. 83–131, *ante*, p. 78.)

Certiorari Dismissed

No. 82–1367. ROADWAY EXPRESS, INC. *v.* WARREN. Ct. App. Ga. [Certiorari granted, 461 U. S. 904.] Writ of certiorari dismissed as improvidently granted.

Miscellaneous Orders

No. A–335. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* THOMPSON. C. A. 11th Cir. Application for stay of mandate, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. A–358. KNAPP *v.* ARIZONA. Application for stay of execution of sentence of death, presented to JUSTICE REHNQUIST, and by him referred to the Court, denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS would grant the application.

No. D–382. IN RE DISBARMENT OF LABER. It is ordered that Henry W. Laber, of Madiera Beach, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–383. IN RE DISBARMENT OF LOWENTHAL. It is ordered that Franklyn L. Lowenthal, of Yonkers, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 82–1295. ESCAMBIA COUNTY, FLORIDA, ET AL. *v.* MCMILLAN ET AL. C. A. 5th Cir. [Probable jurisdiction noted, 460

U. S. 1080.] Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* granted.

No. 82–1474. HOOVER ET AL. *v.* RONWIN ET AL. C. A. 9th Cir. [Certiorari granted, 461 U. S. 926.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted, and 15 minutes of respondents' time for oral argument is allotted for that purpose. Motion of Maryland et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied. JUSTICE O'CONNOR took no part in the consideration or decision of these motions.

No. 82–1577. MICHIGAN CANNERS & FREEZERS ASSN., INC., ET AL. *v.* AGRICULTURAL MARKETING AND BARGAINING BOARD ET AL. Sup. Ct. Mich. [Probable jurisdiction noted, *ante*, p. 912.] Motion of appellees for divided argument denied.

No. 82–1721. SEATTLE TIMES CO., DBA THE SEATTLE TIMES, ET AL. *v.* RHINEHART ET AL. Sup. Ct. Wash. [Certiorari granted, *ante*, p. 812.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted.

No. 82–1795. CAPITAL CITIES CABLE, INC., ET AL. *v.* CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD. C. A. 10th Cir. [Certiorari granted, *ante*, p. 813.] Motion of National League of Cities for leave to file a brief as *amicus curiae* granted.

No. 82–1845. COLORADO *v.* NUNEZ. Sup. Ct. Colo. [Certiorari granted, *ante*, p. 812.] Motion of respondent to dismiss the writ of certiorari for want of jurisdiction denied.

No. 82–1913. GARCIA *v.* SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY ET AL.; and

No. 82–1951. DONOVAN, SECRETARY OF LABOR *v.* SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY ET AL. D. C. W. D. Tex. [Probable jurisdiction noted, *ante*, p. 812.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 82–1998. SECRETARY OF THE INTERIOR ET AL. *v.* COMMUNITY FOR CREATIVE NON-VIOLENCE ET AL. C. A. D. C. Cir. [Certiorari granted *sub nom. Watt* v. *Community for Creative Non-Violence*, *ante*, p. 812.] Motion of respondents to vacate order staying the mandate of the United States Court of Appeals for the District of Columbia Circuit denied.

No. 83-96. LIMBACH, TAX COMMISSIONER OF OHIO *v.* HOOVEN & ALLISON CO. Sup. Ct. Ohio. [Certiorari granted, *ante,* p. 813.] Motion of International Association of Assessing Officers for leave to file a brief as *amicus curiae* granted.

No. 83-5581. GLOVER ET AL. *v.* ALEXANDER, SECRETARY OF THE ARMY. C. A. 4th Cir. Motion of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until December 19, 1983, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co., ante,* p. 928, we would deny the petition for certiorari in this case without reaching the merits of the motion to proceed *in forma pauperis.*

No. 83-664. IN RE FREEMAN. Petition for writ of habeas corpus denied.

No. 83-365. IN RE MOORE, BY MOORE ET AL.; and
No. 83-5542. IN RE GILL. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 83-498. BROWN, DIRECTOR, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY, ET AL. *v.* HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION LOCAL 54 ET AL.; and

No. 83-573. DANZIGER, ACTING CHAIRMAN, CASINO CONTROL COMMISSION OF NEW JERSEY, ET AL. *v.* HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION LOCAL 54 ET AL. Appeals from C. A. 3d Cir. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 709 F. 2d 815.

Certiorari Granted

No. 83-436. REGAN, SECRETARY OF THE TREASURY, ET AL. *v.* WALD ET AL. C. A. 1st Cir. Certiorari granted. Reported below: 708 F. 2d 794.

No. 83–458. BLOCK, SECRETARY OF AGRICULTURE, ET AL. *v.* COMMUNITY NUTRITION INSTITUTE ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 225 U. S. App. D. C. 387, 698 F. 2d 1239.

No. 83–346. UNITED STATES *v.* YERMIAN. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 708 F. 2d 365.

No. 83–712. NEW JERSEY *v.* T. L. O. Sup. Ct. N. J. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 94 N. J. 331, 463 A. 2d 934.

Certiorari Denied. (See also No. 83–561, *supra.*)

No. 82–1983. CALIGURI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 707 F. 2d 511.

No. 82–6620. BREITEGAN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 500 Pa. 384, 456 A. 2d 1340.

No. 82–6945. LOE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 701 F. 2d 169.

No. 82–6986. HARDRICH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 707 F. 2d 992.

No. 82–6992. DURAN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 140 Cal. App. 3d 485, 189 Cal. Rptr. 595.

No. 83–28. CINA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 699 F. 2d 853.

No. 83–61. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 704 F. 2d 315.

No. 83–73. FERRANTE ET AL. *v.* UNITED STATES; and
No. 83–5083. MERS ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 701 F. 2d 1321.

No. 83–108. SHOPE, EXECUTRIX OF THE ESTATE OF SHOPE *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 705 F. 2d 445.

No. 83–139. PEGUES ET AL. *v.* MISSISSIPPI STATE EMPLOYMENT SERVICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 699 F. 2d 760.

No. 83-159. GREENMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 700 F. 2d 1377.

No. 83-166. GUIPPONE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 702 F. 2d 299.

No. 83-176. HERRMANN *v.* UNITED STATES; and

No. 83-5195. ENNIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 707 F. 2d 362.

No. 83-177. LETNES *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA ET AL. C. A. 9th Cir. Certiorari denied.

No. 83-186. IDAHO EX REL. MOON, TREASURER OF IDAHO *v.* STATE BOARD OF EXAMINERS ET AL. Sup. Ct. Idaho. Certiorari denied. Reported below: 104 Idaho 640, 662 P. 2d 221.

No. 83-203. BARNETT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1444.

No. 83-205. CITY OF WAUWATOSA FIRE DEPARTMENT *v.* ORZEL. C. A. 7th Cir. Certiorari denied. Reported below: 697 F. 2d 743.

No. 83-216. MCCRANIE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 703 F. 2d 1213.

No. 83-229. WIMMER *v.* LEHMAN, SECRETARY OF THE NAVY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 705 F. 2d 1402.

No. 83-234. ENNIS *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 334 N. W. 2d 827.

No. 83-244. TELEGRAPH SAVINGS & LOAN ASSN. ET AL. *v.* SCHILLING ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 703 F. 2d 1019.

No. 83-296. LEBOVITZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 716 F. 2d 893.

No. 83-299. TILFORD ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 828.

No. 83-325. CITY OF EVANSTON ET AL. *v.* LUBAVITCH CHABAD HOUSE OF ILLINOIS, INC., ET AL. App. Ct. Ill., 1st

Dist. Certiorari denied. Reported below: 112 Ill. App. 3d 223, 445 N. E. 2d 343.

No. 83-329. COUNTY OF ROCKLAND *v.* U. S. NUCLEAR REGULATORY COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 709 F. 2d 766.

No. 83-331. SHIRILLA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF TAYLOR *v.* SMALLWOOD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 718 F. 2d 1111.

No. 83-336. MAINTENANCE CONTRACTORS, INC. *v.* PIERCE, SECRETARY OF HOUSING AND URBAN DEVELOPMENT. C. A. 6th Cir. Certiorari denied. Reported below: 714 F. 2d 141.

No. 83-338. XHEKA ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 704 F. 2d 974.

No. 83-353. SALORIO ET AL. *v.* GLASER, DIRECTOR OF THE DIVISION OF TAXATION, DEPARTMENT OF THE TREASURY OF NEW JERSEY; and

No. 83-596. GLASER, DIRECTOR OF THE DIVISION OF TAXATION, DEPARTMENT OF THE TREASURY OF NEW JERSEY *v.* SALORIO ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 93 N. J. 447, 461 A. 2d 1100.

No. 83-358. MARTORANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 709 F. 2d 863.

No. 83-361. ERLBAUM, NEW YORK CITY CRIMINAL COURT JUDGE *v.* MORGENTHAU, NEW YORK COUNTY DISTRICT ATTORNEY. Ct. App. N. Y. Certiorari denied. Reported below: 59 N. Y. 2d 143, 451 N. E. 2d 150.

No. 83-368. RUSSO ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 209.

No. 83-425. MANCUSO ET AL. *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1438.

No. 83-463. STERN *v.* SHOULDICE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 706 F. 2d 742.

No. 83-510. LOCAL UNION 1702, UNITED MINE WORKERS OF AMERICA *v.* CONSOLIDATION COAL CO. C. A. 4th Cir. Certiorari denied. Reported below: 709 F. 2d 882.

No. 83-516. Baer Manufacturing, Inc., et al. *v.* Sheet Metal Workers Pension Plan of Southern California, Arizona, and Nevada, et al. C. A. 9th Cir. Certiorari denied. Reported below: 714 F. 2d 154.

No. 83-520. Meyer *v.* Maryland. Ct. Sp. App. Md. Certiorari denied. Reported below: 55 Md. App. 771.

No. 83-521. Plaza de las Armas, Inc., et al. *v.* City of San Antonio et al. C. A. 5th Cir. Certiorari denied. Reported below: 707 F. 2d 513.

No. 83-526. Rickards et al. *v.* Canine Eye Registration Foundation, Inc., et al. C. A. 9th Cir. Certiorari denied. Reported below: 704 F. 2d 1449.

No. 83-528. Coburn *v.* Pan American World Airways, Inc. C. A. D. C. Cir. Certiorari denied. Reported below: 229 U. S. App. D. C. 61, 711 F. 2d 339.

No. 83-536. Barclay Equestrian Center, Inc. *v.* Continental Bank of Pennsylvania. Sup. Ct. N. J. Certiorari denied. Reported below: 93 N. J. 153, 459 A. 2d 1163.

No. 83-540. Westbrook *v.* Hutchinson Crane Excavating Co., Inc. Ct. App. D. C. Certiorari denied.

No. 83-549. Abramoff *v.* Wisconsin. Ct. App. Wis. Certiorari denied. Reported below: 114 Wis. 2d 206, 338 N. W. 2d 502.

No. 83-550. Jameson *v.* Bethlehem Steel Corp. C. A. 6th Cir. Certiorari denied. Reported below: 714 F. 2d 140.

No. 83-554. University College of the University of Alabama in Birmingham et al. *v.* Johnson et al. C. A. 11th Cir. Certiorari denied. Reported below: 706 F. 2d 1205.

No. 83-556. Presto Casting Co. *v.* National Labor Relations Board. C. A. 9th Cir. Certiorari denied. Reported below: 708 F. 2d 495.

No. 83-557. Regal et ux., dba Regal Crest Village of Brookfield, et al. *v.* Behul et ux. C. A. 7th Cir. Certiorari denied. Reported below: 714 F. 2d 149.

No. 83-560. EDWARDS ET AL. *v.* BECHTEL ASSOCIATES PROFESSIONAL CORP., D.C., ET AL. Ct. App. D. C. Certiorari denied. Reported below: 466 A. 2d 436.

No. 83-562. DEAN *v.* TRANS WORLD AIRLINES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 708 F. 2d 486.

No. 83-564. HAWKINS ET AL. *v.* JNO. MCCALL COAL EXPORT CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 711 F. 2d 1050.

No. 83-567. HESS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 279 S. C. 426, 309 S. E. 2d 741.

No. 83-577. LIONTI ET AL. *v.* LLOYD'S INSURANCE CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 709 F. 2d 237.

No. 83-579. ELKINS *v.* BOARD OF LAW EXAMINERS OF NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 308 N. C. 317, 302 S. E. 2d 215.

No. 83-582. JONES ET UX. *v.* NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 714 F. 2d 131.

No. 83-604. SANDLIN *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 61 N. C. App. 421, 300 S. E. 2d 893.

No. 83-609. BLAIR ET AL. *v.* BOULGER. Sup. Ct. N. D. Certiorari denied. Reported below: 336 N. W. 2d 337.

No. 83-615. MARX *v.* CENTRAN CORP. ET AL. C. A. 6th Cir. Certiorari before judgment denied.

No. 83-627. WIGINTON *v.* VETERANS ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 714 F. 2d 162.

No. 83-642. STATE BANK OF ST. CHARLES, AS ADMINISTRATOR OF THE ESTATE OF WARD *v.* CAMIC ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 712 F. 2d 1140.

No. 83-645. PAUL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 705 F. 2d 469.

No. 83-646. SUAREZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 669.

No. 83-667. CROSS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 718 F. 2d 1112.

No. 83-680. MOTLAGH *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 230 U. S. App. D. C. 212, 716 F. 2d 16.

No. 83-684. SMITH *v.* LUBBERS, GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 230 U. S. App. D. C. 71, 713 F. 2d 865.

No. 83-695. SMITH INTERNATIONAL, INC. *v.* HUGHES TOOL CO. C. A. Fed. Cir. Certiorari denied. Reported below: 718 F. 2d 1573.

No. 83-711. NIFONG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 716 F. 2d 898.

No. 83-718. BOTTI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 722 F. 2d 735.

No. 83-5001. MADYUN *v.* FRANZEN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 704 F. 2d 954.

No. 83-5005. CATANESE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 714 F. 2d 125.

No. 83-5019. ROBERTS *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 430 So. 2d 468.

No. 83-5022. SALAZAR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1445.

No. 83-5023. BUSTAMANTE-CUADROS *v.* UNITED STATES; and
No. 83-5212. GRAVIER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 706 F. 2d 174.

No. 83-5029. LESTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 706 F. 2d 316.

No. 83-5032. BANUELOS-SANCHEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 709 F. 2d 1518.

No. 83–5061. OLIVER *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 430 So. 2d 650.

No. 83–5064. EWING ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 709 F. 2d 1496.

No. 83–5080. TENORIO-BOHOROQUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 709 F. 2d 1519.

No. 83–5116. HARRIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 707 F. 2d 653.

No. 83–5151. BELL *v.* MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL INSTITUTE. C. A. 6th Cir. Certiorari denied.

No. 83–5178. GODDARD *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 649 S. W. 2d 882.

No. 83–5215. STEEBE *v.* UNITED STATES RAILROAD RETIREMENT BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 708 F. 2d 250.

No. 83–5252. PARKER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 649 S. W. 2d 46.

No. 83–5259. HORTON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 705 F. 2d 1414.

No. 83–5266. NARDONE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 706 F. 2d 494.

No. 83–5287. SHEDD *v.* HIGGS. Ct. App. Ga. Certiorari denied. Reported below: 166 Ga. App. 344, 304 S. E. 2d 85.

No. 83–5291. NOE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 654 S. W. 2d 701.

No. 83–5302. MOORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 710 F. 2d 270.

No. 83–5309. RICKETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 708 F. 2d 606.

No. 83–5312. MADERA *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 83–5313. HACHLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 707 F. 2d 519.

No. 83–5326. FIELDS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 466 A. 2d 822.

No. 83–5330. DUNCAN *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 83–5361. MOORE *v.* MICHIGAN DEPARTMENT OF CORRECTIONS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 714 F. 2d 141.

No. 83–5370. MYERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 716 F. 2d 905.

No. 83–5374. JONES ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, ORANGE COUNTY. C. A. 9th Cir. Certiorari denied.

No. 83–5394. CALDERON *v.* DEPARTMENT OF THE ARMY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 711 F. 2d 1049.

No. 83–5415. THOMAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 711 F. 2d 1067.

No. 83–5445. ONDRUSEK *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 3d Cir. Certiorari denied. Reported below: 707 F. 2d 1403.

No. 83–5451. TIJERINA *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 436 So. 2d 121.

No. 83–5464. DAVIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 668.

No. 83–5469. RUSS *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 714 F. 2d 146.

No. 83–5473. MCFADDEN *v.* LUCAS, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 713 F. 2d 143.

No. 83–5474. WHITE *v.* COLORADO ET AL. C. A. 10th Cir. Certiorari denied.

No. 83–5477. YELVERTON *v.* BLUE BELL, INC. C. A. 4th Cir. Certiorari denied. Reported below: 714 F. 2d 135.

No. 83-5490. SILVA *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. Reported below: 137 Ariz. 339, 670 P. 2d 737.

No. 83-5493. HAYNES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 716 F. 2d 898.

No. 83-5495. BIRCHFIELD *v.* GENERAL MOTORS ACCEPTANCE CORP. Ct. App. Okla. Certiorari denied.

No. 83-5497. KISH *v.* BENEDEK ET AL. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 421 So. 2d 75.

No. 83-5498. SMART *v.* RAUP ET AL. C. A. 3d Cir. Certiorari denied.

No. 83-5507. WILSON *v.* DUNN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 709 F. 2d 1520.

No. 83-5510. SERIO *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 703 F. 2d 555.

No. 83-5516. TURNER *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 711 F. 2d 1069.

No. 83-5526. DAVIS *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 711 F. 2d 1053.

No. 83-5534. FILIPAS *v.* AKRON GENERAL HOSPITAL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 711 F. 2d 1056.

No. 83-5539. ARRUDA *v.* FAIR, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTION, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 710 F. 2d 886.

No. 83-5545. GRAVES *v.* STOCKLEY, CLERK OF CIRCUIT COURT OF LASALLE COUNTY, ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 714 F. 2d 150.

No. 83-5548. KENDRICKS *v.* MOUNT SINAI HOSPITAL MEDICAL CENTER OF CHICAGO. C. A. 7th Cir. Certiorari denied. Reported below: 714 F. 2d 150.

No. 83-5550. FILIPAS *v.* KRAUSE, ADMINISTRATOR, WORKMEN'S COMPENSATION, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1501.

No. 83-5552. TAYLOR *v.* CURRY, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 708 F. 2d 886.

No. 83-5559. WALD *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, COUNCIL NO. 42, LOCAL 357. C. A. 9th Cir. Certiorari denied. Reported below: 716 F. 2d 912.

No. 83-5561. NEAL *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir. Certiorari denied. Reported below: 723 F. 2d 68.

No. 83-5562. OWENS *v.* MORDER. C. A. 3d Cir. Certiorari denied. Reported below: 723 F. 2d 897.

No. 83-5564. HERSHIPS *v.* MACCLAREN ET AL. Sup. Ct. Cal. Certiorari denied.

No. 83-5568. DAVIS *v.* CLYMER, DEPUTY SUPERINTENDENT, CAMP HILL, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 661.

No. 83-5569. LONG *v.* KIRK ET AL. C. A. D. C. Cir. Certiorari denied.

No. 83-5574. UDELL *v.* STATE DEPARTMENT OF MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari denied.

No. 83-5576. HENSLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 716 F. 2d 911.

No. 83-5577. KNIGHTS *v.* WOLFF, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 713 F. 2d 240.

No. 83-5582. BROWN *v.* HOPPER. C. A. 4th Cir. Certiorari denied. Reported below: 716 F. 2d 894.

No. 83-5585. ODOM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 714 F. 2d 134.

No. 83-5588. POLK *v.* KRAMARSKY, COMMISSIONER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 711 F. 2d 505.

No. 83-5600. QUERO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 714 F. 2d 158.

No. 83-5618. FORSYTH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1443.

No. 83-5619. DAVIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 710 F. 2d 104.

No. 83-5637. RODMAN *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 714 F. 2d 153.

No. 83-5639. SCHAFER *v.* SHARP, UNITED STATES DISTRICT COURT JUDGE, NORTHERN DISTRICT OF INDIANA. C. A. 7th Cir. Certiorari denied.

No. 83-5640. MCCRAE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 714 F. 2d 83.

No. 83-5645. BARRAGAN-CEPEDA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 718 F. 2d 1112.

No. 83-5648. CORRICELLI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 720 F. 2d 657.

No. 83-5652. CONLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 708 F. 2d 1455.

No. 83-5653. CHERNACK *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 720 F. 2d 657.

No. 83-5654. CROSBY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 713 F. 2d 1066.

No. 83-5669. WINPENNY *v.* MONTEMURO, ADMINISTRATIVE JUDGE OF THE PHILADELPHIA DOMESTIC RELATIONS COURT. Sup. Ct. Pa. Certiorari denied. Reported below: 501 Pa. 330, 461 A. 2d 612.

No. 83-5673. ILLSLEY *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 720 F. 2d 679.

No. 83-5674. MCMAHON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 715 F. 2d 498.

No. 83-5681. GOODMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 82-6729. DAVIS *v.* ILLINOIS. Sup. Ct. Ill. Motion of petitioner to defer consideration of the petition for writ of certiorari and for other relief denied. Certiorari denied. Reported below: 95 Ill. 2d 1, 447 N. E. 2d 353.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 83–113. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* PROFFITT. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 685 F. 2d 1227 and 706 F. 2d 311.

No. 83–200. MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* TARPLEY. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 703 F. 2d 157.

No. 83–514. HALL *v.* UNITED STATES ET AL. C. A. 6th Cir. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 704 F. 2d 246.

No. 83–539. ARTHUR ANDERSEN & CO. ET AL. *v.* SCHACHT, ACTING DIRECTOR OF INSURANCE OF ILLINOIS AND LIQUIDATOR OF RESERVE INSURANCE CO.; and

No. 83–548. BROWN ET AL. *v.* SCHACHT, ACTING DIRECTOR OF INSURANCE OF ILLINOIS AND LIQUIDATOR OF RESERVE INSURANCE CO. C. A. 7th Cir. Motion of Peat, Marwick, Mitchell & Co. for leave to file a brief as *amicus curiae* in No. 83–539 granted. Certiorari denied. Reported below: 711 F. 2d 1343.

No. 83–547. OHIO-SEALY MATTRESS MANUFACTURING CO. ET AL. *v.* SEALY, INC., ET AL. C. A. 7th Cir. Motion of petitioners to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 712 F. 2d 270.

No. 83–583. JOYNER *v.* MOFFORD, SECRETARY OF STATE OF ARIZONA, ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 706 F. 2d 1523.

No. 83-594. PITTS *v.* GAF CORP. ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition. Reported below: 712 F. 2d 276.

No. 83-5509. PROFFITT *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.;
No. 83-5530. SCHIRO *v.* INDIANA. Sup. Ct. Ind.;
No. 83-5533. LANEY *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 83-5544. SMITH *v.* KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. C. A. 11th Cir.; and
No. 83-5644. ANTONE *v.* STRICKLAND, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: No. 83-5509, 685 F. 2d 1227 and 706 F. 2d 311; No. 83-5530, 451 N. E. 2d 1047; No. 83-5533, 654 S. W. 2d 383; No. 83-5544, 715 F. 2d 1459; No. 83-5644, 706 F. 2d 1534.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 82-1390. ASHLEY ET AL. *v.* CITY OF JACKSON, MISSISSIPPI, ET AL., *ante*, p. 900;
No. 82-1633. HOSPITAL BUILDING CO. *v.* TRUSTEES OF REX HOSPITAL ET AL., *ante*, p. 904;
No. 82-1914. FALKOWSKI *v.* PERRY ET AL., *ante*, p. 819;
No. 82-1947. KOKER ET UX. *v.* BETTS ET AL., *ante*, p. 803;
No. 82-2044. WESTERN FOOD EQUIPMENT CO. *v.* FOSS AMERICA, INC., *ante*, p. 825;
No. 82-2106. LAMPKIN *v.* NORTH AMERICAN FINANCE CO., *ante*, p. 828;
No. 82-2125. METROPOLITAN PACKAGE STORE ASSN., INC., ET AL. *v.* KOCH, MAYOR OF THE CITY OF NEW YORK, ET AL., *ante*, p. 802;
No. 82-2142. YEE *v.* YEE ET AL., *ante*, p. 829;
No. 82-6487. GADOMSKI *v.* UNITED STATES STEEL CORP., 461 U. S. 946; and
No. 82-6785. RONAN *v.* BRIGGS ET AL., *ante*, p. 836. Petitions for rehearing denied.

No. 82-6822. V. J. S. *v.* ILLINOIS, *ante*, p. 837;
No. 82-6849. REESE *v.* ALABAMA, *ante*, p. 838;
No. 82-6852. WILSON *v.* GEORGIA, *ante*, p. 865;
No. 82-6872. BRIDGES *v.* TEXAS, *ante*, p. 838;
No. 82-6881. FREE *v.* ILLINOIS, *ante*, p. 865;
No. 82-6897. HOLCOMB *v.* CALIFORNIA ET AL., *ante*, p. 840;
No. 82-6898. WILLIAMS *v.* UNITED STATES, *ante*, p. 840;
No. 82-6943. ENGEL *v.* NEW YORK STATE HUMAN RIGHTS APPEAL BOARD ET AL., *ante*, p. 841;
No. 82-6944. ENGEL *v.* NEW YORK STATE HUMAN RIGHTS APPEAL BOARD ET AL., *ante*, p. 841;
No. 82-6973. LINDSEY *v.* LOUISIANA, *ante*, p. 908;
No. 82-6979. LARETTE *v.* MISSOURI, *ante*, p. 908;
No. 82-6982. NARCISSE *v.* LOUISIANA, *ante*, p. 865;
No. 82-6990. PETERSON *v.* VIRGINIA, *ante*, p. 865;
No. 83-34. STOUFFER CORP. *v.* PRUDENTIAL INSURANCE COMPANY OF AMERICA ET AL., *ante*, p. 846;
No. 83-99. VARKONYI, INDIVIDUALLY, AND DBA METAL RECYCLING CO. *v.* DONOVAN, SECRETARY OF LABOR, *ante*, p. 849;
No. 83-148. JOHNSON *v.* DISTRICT SCHOOL BOARD OF HERNANDO COUNTY, FLORIDA, *ante*, p. 851;
No. 83-152. KARAPINKA *v.* UNION CARBIDE CORP. ET AL., *ante*, p. 892;
No. 83-155. VEENKANT *v.* GURN ET AL., *ante*, p. 851;
No. 83-156. VEENKANT *v.* BLAKE ET AL.; and VEENKANT *v.* CORSIGLIA ET AL., *ante*, p. 874;
No. 83-157. VEENKANT *v.* WESLER ET AL., *ante*, p. 851;
No. 83-167. PFISTER *v.* AMERICAN AIRLINES, INC., ET AL., *ante*, p. 874;
No. 83-178. WESTERN COMPANY OF NORTH AMERICA *v.* UNITED STATES, *ante*, p. 892;
No. 83-187. TSANOS ET AL. *v.* DIVISION OF ADMINISTRATION, FLORIDA DEPARTMENT OF TRANSPORTATION, *ante*, p. 852;
No. 83-192. BOUCLIN *v.* UNITED STATES, *ante*, p. 852;
No. 83-267. BROWNFIELD *v.* CITY OF LAGUNA BEACH ET AL., *ante*, p. 894;
No. 83-5038. BRUCE *v.* UPPER EAST TENNESSEE HUMAN DEVELOPMENT AGENCY, INC., ET AL., *ante*, p. 854;
No. 83-5046. GASTON *v.* UNITED STATES, *ante*, p. 854;
No. 83-5051. WILLIAMS *v.* NORTH CAROLINA, *ante*, p. 865; and
No. 83-5085. PIATKOWSKA *v.* VONS FOODMARKETS, *ante*, p. 856. Petitions for rehearing denied.

No. 83–5095. CONNER *v.* GEORGIA, *ante*, p. 865;

No. 83–5147. GRAHAM *v.* NEW YORK, *ante*, p. 896;

No. 83–5207. MULLIGAN *v.* ARIZONA, *ante*, p. 860;

No. 83–5248. WHEELING *v.* COMMISSIONER OF INTERNAL REVENUE SERVICE, *ante*, p. 862;

No. 83–5279. ATTWELL ET AL. *v.* METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY ET AL., *ante*, p. 897;

No. 83–5299. FLORES ET AL. *v.* ARANGUREN, *ante*, p. 898;

No. 83–5355. MINYE *v.* UNIVERSITY OF MICHIGAN ET AL., *ante*, p. 899; and

No. 83–5366. JAMES *v.* LOUISIANA, *ante*, p. 908. Petitions for rehearing denied.

DECEMBER 5, 1983

Affirmed on Appeal

No. 83–334. BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ALABAMA, ET AL. *v.* BROWN ET AL. Affirmed on appeal from C. A. 11th Cir. Reported below: 706 F. 2d 1103.

Appeal Dismissed

No. 83–280. UTILITY TRAILER SALES CO. *v.* MACHINISTS AUTOMOTIVE TRADES DISTRICT LODGE NO. 190 OF NORTHERN CALIFORNIA ET AL. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question. Reported below: 141 Cal. App. 3d 80, 190 Cal. Rptr. 98.

Miscellaneous Orders

No. A–394. IN RE DAWSON. C. A. 11th Cir. Application for certificate of probable cause to appeal, presented to JUSTICE POWELL, and by him referred to the Court, denied.

No. A–408. CHASE MANHATTAN BANK (NATIONAL ASSN.) *v.* SAND, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK. Application for stay of an order of the United States District Court for the Southern District of New York, presented to JUSTICE MARSHALL, and by him referred to the Court, denied.

No. 82–792. GROVE CITY COLLEGE ET AL. *v.* BELL, SECRETARY OF EDUCATION, ET AL. C. A. 3d Cir. [Certiorari granted, 459 U. S. 1199.] Motion of the Solicitor General for leave to file a supplemental brief after argument granted.

No. 82–1330. THIGPEN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. *v.* ROBERTS. C. A. 5th Cir. [Certiorari granted, 461 U. S. 956.] It appearing that respondent is not represented by a member of the Bar of this Court, it is ordered that Rhesa H. Barksdale, Esquire, of Jackson, Miss., is invited to present oral argument as *amicus curiae* in support of the judgment below. Oral argument in this case, presently scheduled for January 18, 1984, is postponed and the case of *New York* v. *Uplinger*, No. 82–1724 [certiorari granted, *ante*, p. 812], is set for oral argument in its stead.

No. 82–1577. MICHIGAN CANNERS & FREEZERS ASSN., INC., ET AL. *v.* AGRICULTURAL MARKETING AND BARGAINING BOARD ET AL. Sup. Ct. Mich. [Probable jurisdiction noted, *ante*, p. 912.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 83–240. LAWRENCE COUNTY ET AL. *v.* LEAD-DEADWOOD SCHOOL DISTRICT No. 40–1. Sup. Ct. S. D.;

No. 83–592. OSTROSKY ET AL. *v.* ALASKA. Sup. Ct. Alaska;

No. 83–610. BABBITT FORD, INC. *v.* NAVAJO INDIAN TRIBE ET AL. C. A. 9th Cir.; and

No. 83–640. TEXAS *v.* KVUE–TV, INC., ET AL. C. A. 5th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 83–455. MEACHUM, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS, ET AL. *v.* BATTLE ET AL. C. A. 10th Cir. Motion of petitioners to defer consideration of the petition for writ of certiorari denied.

No. 83–5634. IN RE BROWN. Petition for writ of habeas corpus denied.

No. 83–576. IN RE AMERICAN BROADCASTING COS., INC.;

No. 83–5589. IN RE GRIFFITH; and

No. 83–5590. IN RE CANION. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 83–276. SELECTIVE SERVICE SYSTEM ET AL. *v.* MINNESOTA PUBLIC INTEREST RESEARCH GROUP ET AL. Appeal from D. C. Minn. Probable jurisdiction noted. Reported below: 557 F. Supp. 937.

Certiorari Granted

No. 83-630. BERNAL *v.* FAINTER, SECRETARY OF STATE OF TEXAS, ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 710 F. 2d 190.

No. 83-218. REED ET AL. *v.* ROSS. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 704 F. 2d 705.

No. 83-620. UNITED STATES *v.* RODGERS. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 706 F. 2d 854.

No. 83-558. IRVING INDEPENDENT SCHOOL DISTRICT *v.* TATRO ET UX., INDIVIDUALLY, AND AS NEXT FRIENDS OF TATRO, A MINOR. C. A. 5th Cir. Motion of National School Boards Association for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 703 F. 2d 823.

Certiorari Denied

No. 82-979. FEDERAL LABOR RELATIONS AUTHORITY *v.* UNITED STATES DEPARTMENT OF AGRICULTURE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 691 F. 2d 1242.

No. 82-1021. FEDERAL LABOR RELATIONS AUTHORITY *v.* DIVISION OF MILITARY AND NAVAL AFFAIRS OF THE STATE OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 683 F. 2d 45.

No. 82-1970. FEDERAL LABOR RELATIONS AUTHORITY *v.* FLORIDA NATIONAL GUARD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 699 F. 2d 1082.

No. 82-7030. NEWMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 709 F. 2d 1519.

No. 83-4. PORTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 701 F. 2d 1158.

No. 83-124. FUSARO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 708 F. 2d 17.

No. 83-256. WILLIAMS *v.* UNITED STATES; and
No. 83-5108. FEINBERG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 705 F. 2d 603.

No. 83-286. KILLOUGH *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 434 So. 2d 852.

No. 83-293. CONWAY ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 711 F. 2d 1060.

No. 83-378. BIG SPRING INDEPENDENT SCHOOL DISTRICT ET AL. *v.* GRIFFEN. C. A. 5th Cir. Certiorari denied. Reported below: 706 F. 2d 645.

No. 83-379. ESTATE OF GRYDER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 705 F. 2d 336.

No. 83-399. LOVEDAY ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 228 U. S. App. D. C. 38, 707 F. 2d 1443.

No. 83-400. J. H. RUTTER REX MANUFACTURING CO., INC. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 706 F. 2d 702.

No. 83-415. HILLER *v.* ALASKA. Super. Ct. Alaska, 3d Jud. Dist. Certiorari denied.

No. 83-427. HALL *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 93 N. J. 552, 461 A. 2d 1155.

No. 83-495. CARROLL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 710 F. 2d 164.

No. 83-523. CUYAHOGA VALLEY HOMEOWNERS & RESIDENTS ASSN. ET AL. *v.* SECRETARY OF THE INTERIOR ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 716 F. 2d 902.

No. 83-563. HENRY S. BRANSCOME, INC., ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 711 F. 2d 570.

No. 83-587. PRUDENTIAL INSURANCE COMPANY OF AMERICA *v.* BENNETT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 710 F. 2d 1361.

No. 83-590. BAXTER *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 446 N. E. 2d 376.

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No. 83-591. **Dalton et al.** *v.* **R. W. T. et al.** C. A. 8th Cir. Certiorari denied. Reported below: 712 F. 2d 1225.

No. 83-597. **Dallas County Commissioners Court et al.** *v.* **Richardson et al.** C. A. 5th Cir. Certiorari denied. Reported below: 709 F. 2d 1016.

No. 83-603. **Kirks** *v.* **Kirks.** Super. Ct. N. C., Wake County. Certiorari denied.

No. 83-611. **Schaefer** *v.* **Stone, Trustee.** App. Dept., Super. Ct. Cal., County of San Diego. Certiorari denied.

No. 83-612. **Haynes** *v.* **California.** Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 83-635. **Veenkant** *v.* **Cook et al.** C. A. 6th Cir. Certiorari denied. Reported below: 720 F. 2d 680.

No. 83-639. **Belnap** *v.* **Chang, Director, Department of Social Services and Housing of Hawaii, et al.** C. A. 9th Cir. Certiorari denied. Reported below: 707 F. 2d 1100.

No. 83-652. **Peterson** *v.* **Chicago & Eastern Illinois Railroad Co. et al.** C. A. 7th Cir. Certiorari denied. Reported below: 714 F. 2d 145.

No. 83-653. **Leatherby Insurance Co., aka Western Employers Insurance Co.** *v.* **Merit Insurance Co.** C. A. 7th Cir. Certiorari denied. Reported below: 714 F. 2d 673.

No. 83-682. **Harris** *v.* **City of Norfolk, Virginia, et al.** C. A. 4th Cir. Certiorari denied. Reported below: 707 F. 2d 506.

No. 83-709. **Walton** *v.* **Small Business Administration.** C. A. D. C. Cir. Certiorari denied.

No. 83-742. **Bradshaw** *v.* **United States.** C. A. 10th Cir. Certiorari denied.

No. 83-744. **Fuentes** *v.* **Michigan.** Ct. App. Mich. Certiorari denied. Reported below: 118 Mich. App. 135, 324 N. W. 2d 782.

No. 83-764. **Rivera** *v.* **United States.** C. A. 11th Cir. Certiorari denied. Reported below: 716 F. 2d 913.

No. 83-5021. DAVIS *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Ct. Crim. App. Tex. Certiorari denied.

No. 83-5308. SALKIL *v.* MISSOURI. Ct. App. Mo., Southern Dist. Certiorari denied. Reported below: 649 S. W. 2d 509.

No. 83-5311. NOGGLE *v.* MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 706 F. 2d 1408.

No. 83-5336. CORREA-DE JESUS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 708 F. 2d 1283.

No. 83-5351. QUINN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 709 F. 2d 1519.

No. 83-5368. ODOM *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 83-5371. STANLEY *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 433 So. 2d 69.

No. 83-5376. MARSHALL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 714 F. 2d 143.

No. 83-5411. BANKS *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 432 So. 2d 1246.

No. 83-5413. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 709 F. 2d 639.

No. 83-5453. CARDILLO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 708 F. 2d 29.

No. 83-5502. FELICIANO *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 714 F. 2d 148.

No. 83-5513. STINSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 92 App. Div. 2d 676, 460 N. Y. S. 2d 182.

No. 83-5571. TOLK *v.* WEINSTEN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1431.

No. 83-5572. MCMILLAN *v.* HESTER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 714 F. 2d 141.

No. 83-5578. HARRIS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 83-5583. ASHWORTH *v.* LOS ANGELES COUNTY, CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 83-5591. MITCHELL *v.* NOCERA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1438.

No. 83-5593. JOHNSON *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 712 F. 2d 1417.

No. 83-5594. JOHNSON *v.* HENRY. App. Sess., Super. Ct. Conn. Certiorari denied. Reported below: 38 Conn. Supp. 718, 461 A. 2d 1001.

No. 83-5597. SPRADLIN ET AL. *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 214 Neb. 834, 336 N. W. 2d 563.

No. 83-5599. MEDINA-REYES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 715 F. 2d 575.

No. 83-5605. CUTTS *v.* WYRICK, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 83-5607. KING *v.* MCEVERS ET AL. C. A. 7th Cir. Certiorari denied.

No. 83-5617. SMITH-BEY *v.* SABO, JUDGE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 667.

No. 83-5624. MORVAY *v.* MAGHIELSE TOOL & DIE CO., INC. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 229.

No. 83-5642. MARKS *v.* UNITED STATES POSTAL SERVICE. C. A. D. C. Cir. Certiorari denied.

No. 83-5647. GREATHOUSE *v.* MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 711 F. 2d 1056.

No. 83-5658. HAMPTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 714 F. 2d 157.

No. 83-5661. RHODES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 713 F. 2d 463.

No. 83-5666. SRUBAR ET UX. *v.* DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 1442.

No. 83-5685. LEMAIRE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 712 F. 2d 944.

No. 83-5688. MCDANIEL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 710 F. 2d 839.

No. 83-5708. ROJAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 711 F. 2d 1069.

No. 83-5709. PRUITT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 719 F. 2d 975.

No. 83-5710. TOWNS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1511.

No. 83-438. HENDERSON *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 279 Ark. 414, 652 S. W. 2d 26.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 83-572. BALDWIN ET AL. *v.* CITY OF WINSTON-SALEM, NORTH CAROLINA, ET AL. C. A. 4th Cir. Motion of North Carolina Farm Bureau Federation, Inc., et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 710 F. 2d 132.

No. 83-586. SHELL PETROLEUM N.V. *v.* FRANCHETTI ET AL. C. A. 9th Cir. Motions of Belgium et al. and Unitary Tax Campaign Limited for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of these motions and this petition. Reported below: 709 F. 2d 593.

No. 83-617. WACHSMAN ET AL. *v.* CITY OF DALLAS ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 704 F. 2d 160.

No. 83-629. **Hasbro Industries, Inc., et al.** *v.* **A/S Garonne-Glittre et al.** C. A. 9th Cir. Certiorari denied. **Justice Blackmun** took no part in the consideration or decision of this petition. Reported below: 705 F. 2d 339.

No. 83-5260. **Washington** *v.* **New York City Board of Estimate.** C. A. 2d Cir. Certiorari denied. **Justice Marshall** would grant certiorari. Reported below: 709 F. 2d 792.

No. 83-5273. **Delegal** *v.* **United States.** C. A. 7th Cir. Certiorari denied. **Justice White** took no part in the consideration or decision of this petition. Reported below: 714 F. 2d 146.

Rehearing Denied

No. — - ——. **P Stone, Inc.** *v.* **Koppers Co., Inc., et al.**, *ante*, p. 879;

No. 82-1718. **Randall Book Corp.** *v.* **Maryland**, *ante*, p. 919;

No. 82-6865. **Muhammad** *v.* **Florida**, *ante*, p. 865;

No. 83-302. **Avedisian** *v.* **May et al.**, *ante*, p. 909; and

No. 83-311. **Strassner** *v.* **Strassner**, *ante*, p. 936. Petitions for rehearing denied.

December 12, 1983

Affirmed on Appeal

No. 83-737. **California et al.** *v.* **United States et al.**; and

No. 83-738. **New York State Department of Public Service** *v.* **United States et al.** Affirmed on appeals from D. C. D. C. Reported below: 569 F. Supp. 1057.

Appeals Dismissed

No. 82-1848. **Chicago Bridge & Iron Co.** *v.* **Washington Department of Revenue.** Appeal from Sup. Ct. Wash. dismissed for want of substantial federal question. Reported below: 98 Wash. 2d 814, 659 P. 2d 463.

No. 83-655. **Crowder** *v.* **Texas.** Appeal from Ct. Crim. App. Tex. dismissed for want of substantial federal question. Reported below: 653 S. W. 2d 823.

No. 83-662. **Gaines** *v.* **Merchants National Bank & Trust Co.** Appeal from C. A. 7th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 718 F. 2d 1103.

No. 83-5620. DEAN *v.* UNITED STATES. Appeal from D. C. N. D. Ga. dismissed for want of jurisdiction.

Certiorari Granted—Vacated and Remanded. (See No. 82-2083, *ante*, p. 114.)

Certiorari Dismissed

No. 82-1711. COLORADO *v.* QUINTERO. Sup. Ct. Colo. [Certiorari granted, 463 U. S. 1206.] Motion of petitioner to proceed with oral argument and decision denied. The writ of certiorari is dismissed, it appearing that respondent died on November 27, 1983.

Miscellaneous Orders

No. D-389. IN RE DISBARMENT OF COHEN. It is ordered that Ray Jeffrey Cohen, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-390. IN RE DISBARMENT OF NAGEL. It is ordered that Edward A. Nagel, of Maitland, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 82-1295. ESCAMBIA COUNTY, FLORIDA, ET AL. *v.* MCMILLAN ET AL. C. A. 5th Cir. [Probable jurisdiction noted, 460 U. S. 1080.] Further consideration of the notice of substitution of party appellants and motion of certain appellants to dismiss the appeal is deferred to hearing of the case on the merits on January 10, 1984.

No. 82-1474. HOOVER ET AL. *v.* RONWIN ET AL. C. A. 9th Cir. [Certiorari granted, 461 U. S. 926.] Motion of respondent Ronwin for reconsideration of order granting divided argument [*ante*, p. 989] denied. JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 82-1565. BACCHUS IMPORTS, LTD., ET AL. *v.* FREITAS, DIRECTOR OF TAXATION OF HAWAII, ET AL. Sup. Ct. Haw. [Probable jurisdiction noted, 462 U. S. 1130.] Motion of appellee George Freitas, Director of Taxation of the State of Hawaii, to dismiss the appeal or remand the case denied. JUSTICE BRENNAN took no part in the consideration or decision of this motion.

No. 82-1579. HAYFIELD NORTHERN RAILROAD CO., INC., ET AL. *v.* CHICAGO & NORTH WESTERN TRANSPORTATION CO. C. A. 8th Cir. [Probable jurisdiction noted, *ante*, p. 812.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 82-1724. NEW YORK *v.* UPLINGER ET AL. Ct. App. N. Y. [Certiorari granted, *ante*, p. 812.] Motion of respondent Butler for divided argument denied. JUSTICE MARSHALL would grant this motion.

No. 82-1766. SECURITIES INDUSTRY ASSN. ET AL. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 812.] Motion of petitioners for divided argument denied. JUSTICE MARSHALL would grant this motion.

No. 82-1771. UNITED STATES *v.* LEON ET AL. C. A. 9th Cir. [Certiorari granted, 463 U. S. 1206.] Motion of respondents Sanchez et al. for modification of order granting divided argument [*ante*, p. 889] denied.

No. 82-1795. CAPITAL CITIES CABLE, INC., ET AL. *v.* CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD. C. A. 10th Cir. [Certiorari granted, *ante*, p. 813.] Motion of petitioners for divided argument denied. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied.

No. 82-1860. SCHNEIDER MOVING & STORAGE CO. *v.* ROBBINS ET AL.; and

No. 82-1862. PROSSER'S MOVING & STORAGE CO. *v.* ROBBINS ET AL. C. A. 8th Cir. [Certiorari granted, *ante*, p. 813.] Motion of petitioners in No. 82-1860 for divided argument granted. Motion of petitioners in No. 82-1862 for divided argument granted. Requests for additional time for oral argument denied.

No. 82–1998. CLARK, SECRETARY OF THE INTERIOR, ET AL. *v.* COMMUNITY FOR CREATIVE NON-VIOLENCE ET AL. C. A. D. C. Cir. [Certiorari granted *sub nom. Watt* v. *Community for Creative Non-Violence, ante,* p. 812.] Motion of respondents for leave to file supplemental joint appendix not in compliance with this Court's Rule 33 denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant this motion.

No. 82–6956. CROSS *v.* SECRETARY OF STATE, *ante,* p. 928. Motion of appellant for reconsideration of order denying leave to proceed *in forma pauperis* denied.

No. 83–623. JAMES ET AL. *v.* CLARK, SECRETARY OF THE INTERIOR, ET AL. C. A. 1st Cir. Motion of petitioners to defer consideration of the petition for writ of certiorari denied.

No. 83–5040. ENO ET AL. *v.* UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ET AL., *ante,* p. 928. Motion of petitioners for reconsideration of order denying leave to proceed *in forma pauperis* denied.

No. 83–5611. WINDSOR *v.* THE TENNESSEAN ET AL. Ct. App. Tenn. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until January 3, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co., ante,* p. 928, we would deny the petition for certiorari in this case without reaching the merits of the motion to proceed *in forma pauperis.*

No. 83–5601. IN RE WILLIAMS. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 83–297. ARMCO INC. *v.* HARDESTY, TAX COMMISSIONER OF WEST VIRGINIA. Appeal from Sup. Ct. App. W. Va. Probable jurisdiction noted. Reported below: —— W. Va. ——, 303 S. E. 2d 706.

No. 83-490. **Davis et al.** *v.* **Scherer.** Appeal from C. A. 11th Cir. Probable jurisdiction noted. Reported below: 710 F. 2d 838.

Certiorari Granted

No. 82-2140. **Hobby** *v.* **United States.** C. A. 4th Cir. Certiorari granted limited to Question 3 presented by the petition. Reported below: 702 F. 2d 466.

No. 83-328. **Mabry, Commissioner, Arkansas Department of Correction** *v.* **Johnson.** C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 707 F. 2d 323.

Certiorari Denied. (See also No. 83-662, *supra.*)

No. 82-7014. **Thompson** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 707 F. 2d 514.

No. 83-295. **Costa** *v.* **Markey et al.** C. A. 1st Cir. Certiorari denied. Reported below: 706 F. 2d 1.

No. 83-320. **Anderson County, Tennessee, et al.** *v.* **United States.** C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 184.

No. 83-359. **Yavapai-Prescott Indian Tribe** *v.* **Clark, Secretary of the Interior, et al.** C. A. 9th Cir. Certiorari denied. Reported below: 707 F. 2d 1072.

No. 83-484. **Slevin et al.** *v.* **City of New York et al.**; and
No. 83-485. **Barry et al.** *v.* **City of New York et al.** C. A. 2d Cir. Certiorari denied. Reported below: 712 F. 2d 1554.

No. 83-588. **Berger** *v.* **McMonagle, Judge, et al.** Sup. Ct. Ohio. Certiorari denied. Reported below: 6 Ohio St. 3d 28, 451 N. E. 2d 225.

No. 83-647. **Lui Su Nai-Chao, Individually and as Personal Representative of the Estate of Lui Cho-Pon, et al.** *v.* **Boeing Co. et al.** C. A. 9th Cir. Certiorari denied. Reported below: 708 F. 2d 1406.

No. 83-657. **Unger** *v.* **Consolidated Foods Corp.** C. A. 7th Cir. Certiorari denied.

No. 83-660. KEASLER *v.* GRANAT. Sup. Ct. Wash. Certiorari denied. Reported below: 99 Wash. 2d 564, 663 P. 2d 830.

No. 83-666. HERRING *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 435 So. 2d 865.

No. 83-668. PACE *v.* SOUTHERN RAILWAY CO. C. A. 11th Cir. Certiorari denied. Reported below: 701 F. 2d 1383.

No. 83-670. GUNTER *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 83-675. MITLO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 714 F. 2d 294.

No. 83-784. BUFFALO FORGE CO. ET AL. *v.* OGDEN CORP. C. A. 2d Cir. Certiorari denied. Reported below: 717 F. 2d 757.

No. 83-792. CALDEVILLA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 716 F. 2d 913.

No. 83-800. CICCONI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 722 F. 2d 735.

No. 83-813. ALLEN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 11th Cir. Certiorari denied. Reported below: 707 F. 2d 522.

No. 83-5306. FINCH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 708 F. 2d 606.

No. 83-5332. WILLIAMSON *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 113 Wis. 2d 389, 335 N. W. 2d 814.

No. 83-5410. MILLS *v.* COUNTY OF MONROE. Ct. App. N. Y. Certiorari denied. Reported below: 59 N. Y. 2d 307, 451 N. E. 2d 456.

No. 83-5420. INGRAHAM *v.* MCCARTHY ET AL. C. A. 1st Cir. Certiorari denied.

No. 83-5465. KINCAID *v.* EBERLE. C. A. 7th Cir. Certiorari denied. Reported below: 712 F. 2d 1023.

No. 83-5540. EVANS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 96 App. Div. 2d 843, 464 N. Y. S. 2d 1020.

No. 83-5543. GENTSCH *v.* LOWE, CLERK, ET AL. C. A. 5th Cir. Certiorari denied.

No. 83-5604. JOHNSON *v.* TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY ET AL. Sup. Ct. Tenn. Certiorari denied.

No. 83-5608. BEADLE *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 711 F. 2d 1053.

No. 83-5610. PAYNE *v.* JANASZ, CHIEF PROBATION OFFICER, CUYAHOGA COUNTY. C. A. 6th Cir. Certiorari denied. Reported below: 711 F. 2d 1305.

No. 83-5616. IGOE *v.* JONES, DBA G & L INVESTMENTS, INC. C. A. 10th Cir. Certiorari denied.

No. 83-5627. BROWN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 712 F. 2d 1417.

No. 83-5628. CHYLICKA ET AL. *v.* UNITED STATES CATHOLIC CONFERENCE "CARITAS" ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1437.

No. 83-5633. BROWN *v.* RICE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 711 F. 2d 1049.

No. 83-5638. SKAGGS ET AL. *v.* CRAWFORD COUNTY, OHIO, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 708 F. 2d 732.

No. 83-5649. CHAVEZ *v.* BERNALILLO COUNTY DISTRICT COURT. Sup. Ct. N. M. Certiorari denied.

No. 83-5668. NEAL *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 441 So. 2d 139.

No. 83-5683. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 14.

No. 83-5693. MILLER ET AL. *v.* UNION STATE BANK. Sup. Ct. N. D. Certiorari denied. Reported below: 335 N. W. 2d 807.

No. 83-5704. ESGATE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 718 F. 2d 1109.

No. 83-5726. VanDyke *v.* Wawrzaszek, Administrator, Arizona State Prison. C. A. 9th Cir. Certiorari denied. Reported below: 714 F. 2d 156.

No. 83-5727. Williams *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. Reported below: 6 Ohio St. 3d 281, 452 N. E. 2d 1323.

No. 83-5741. Lewis *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1443.

No. 83-5754. Piscanio *v.* Pennsylvania Board of Probation and Parole et al. C. A. 3d Cir. Certiorari denied.

No. 83-5758. Forbes *v.* American Telephone & Telegraph et al. C. A. 9th Cir. Certiorari denied.

No. 83-473 (A-220). Orofino *v.* United States. C. A. 2d Cir. Application for bail and/or stay, addressed to Justice White and referred to the Court, denied. Certiorari denied. Reported below: 742 F. 2d 1443.

No. 83-624. Mashpee Tribe et al. *v.* Clark, Secretary of the Interior, et al. C. A. 1st Cir. Motion of Center for Constitutional Rights et al. for leave to file a brief as *amici curiae* granted. Motion of petitioners to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 707 F. 2d 23.

No. 83-5106. Fields *v.* Wyrick, Warden. C. A. 8th Cir. Certiorari denied. Reported below: 706 F. 2d 879.

Justice Marshall, dissenting.

Last Term, this Court summarily reversed a judgment of the United States Court of Appeals for the Eighth Circuit, which ruled that petitioner's 1975 Missouri rape conviction was based on an involuntary statement taken in violation of petitioner's Fifth Amendment rights. *Wyrick* v. *Fields*, 459 U. S. 42 (1982), rev'g 682 F. 2d 154. I dissented from that summary reversal because I do not believe this Court should decide unsettled questions of constitutional law without plenary review. 459 U. S., at 50. In my dissent, I noted that, even if petitioner's statement were voluntary under the Fifth Amendment, the interrogation that produced petitioner's statement might nevertheless have violated petitioner's Sixth Amendment right to counsel. *Id.*, at 52-55.

On remand, the Eighth Circuit considered this issue and concluded that petitioner had knowingly and intelligently waived his Sixth Amendment right to have counsel present during the interrogation. 706 F. 2d 879 (1983). Because I disagree with the manner in which the Eighth Circuit analyzed petitioner's Sixth Amendment claim, I would grant certiorari and set the case for oral argument.

Petitioner, a soldier undergoing basic training in Missouri, was charged with rape. After consulting with counsel, petitioner told his company commander that he wanted to take a polygraph test. Petitioner was under the impression that if he "passed" a polygraph test, the charges against him would be dropped, and he would be permitted to graduate from basic training on schedule. 682 F. 2d, at 160, n. 10. Petitioner's counsel shared this impression and later testified that he thought "'the polygraph would have merely shown deceit or non-deceit and would have been used for the purposes of a possible pretrial negotiation.'" *Id.*, at 160. Accordingly petitioner's counsel advised him to take the test.

Days later when the test was given, petitioner's counsel was not notified. The military officer in charge of the examination simply informed petitioner of his rights to refuse to answer any questions or to have counsel present, and petitioner signed a document[1] waiving those rights. See *State* v. *Fields*, 538 S. W. 2d 348 (Mo. App. 1976). Throughout the polygraph examination, petitioner professed his innocence. After the examination was over, however, the officer administering the test informed petitioner that the machine revealed "some deceit" and asked petitioner for an explanation. The officer did not tell petitioner that the results of polygraph tests were inadmissible in Missouri courts, nor did the officer remind petitioner of his right to have counsel present during this postexamination interrogation. Petitioner then said that he had had consensual sexual relations with the rape victim on the day of the alleged rape. The officer immediately summoned the local Chief of Police. After receiving a *Miranda* warning from the Police Chief, petitioner repeated his statement. At trial, this statement was the heart of the State's successful prosecution.

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[1] Though not identical, the document followed closely the Fifth Amendment waiver form endorsed by this Court in *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

On remand from this Court's previous decision, the Eighth Circuit acknowledged the difference between the policies underlying the Fifth Amendment right to counsel and those informing the Sixth Amendment right to counsel, but asserted that "where the Defendant had previously invoked his right to counsel, it is relatively clear that the validity of any subsequent waiver of *either* the fifth or sixth amendment right to counsel is judged by essentially the same standard." 706 F. 2d, at 881 (emphasis in original). Relying on this Court's finding that petitioner's preexamination waiver of his Fifth Amendment right to counsel covered his postexamination interrogation, the Court of Appeals concluded that petitioner had simultaneously waived any Sixth Amendment right to counsel during the interrogation. *Ibid.*

As I discussed in my dissent last year, a number of courts have come to accept the view that waivers based solely on unembellished *Miranda* warnings do not necessarily satisfy "'the higher standard with respect to waiver of the right to counsel that applies when the Sixth Amendment [right to counsel] has attached.'" 459 U. S., at 55 (quoting *United States* v. *Massimo*, 432 F. 2d 324, 327 (CA2 1970) (Friendly, J., dissenting), cert. denied, 400 U. S. 1022 (1971); see, *e. g.*, *United States* v. *Mohabir*, 624 F. 2d 1140, 1151 (CA2 1980) (Government must show defendant "understood the nature and the importance of the Sixth Amendment right he was giving up"). But see *Blasingame* v. *Estelle*, 604 F. 2d 893 (CA5 1979); *Moore* v. *Wolff*, 495 F. 2d 35 (CA8 1974). In our own opinions, we have strongly intimated that waivers of the Sixth Amendment right to counsel should be measured by a stricter standard. See *United States* v. *Henry*, 447 U. S. 264, 272–273 (1980); *Brewer* v. *Williams*, 430 U. S. 387, 404 (1977); *Faretta* v. *California*, 422 U. S. 806, 835 (1975).[2]

While acknowledging this widely held view of the Sixth Amendment waiver, the Eighth Circuit determined that the higher standard of Sixth Amendment waiver applies only until a defendant has obtained counsel. The Court of Appeals provided no explanation of why the Sixth Amendment waiver standard should decline once counsel is appointed, and I can see no justification in law or in practice for its ruling.[3] Certainly, the mere appointment of counsel does not significantly affect a criminal defendant's capacity to make an informed choice about waiving the right to counsel. One or two conferences with counsel rarely make a criminal defendant more sophisticated about the importance of obtaining legal advice during the skirmishing antecedent to a criminal prosecution.

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[2] See also Note, Sixth Amendment Right to Counsel: Standards for Knowing and Intelligent Pretrial Waivers, 60 B. U. L. Rev. 738 (1980); Note, Proposed Requirements for Waiver of the Sixth Amendment Right to Counsel, 82 Colum. L. Rev. 363, 365–370 (1982).

In my view, the Eighth Circuit erred in ruling that a criminal defendant waives his Sixth Amendment right to counsel simply by answering questions after being given a *Miranda* warning. Had the Eighth Circuit applied the higher standard of Sixth Amendment waiver endorsed by the Second Circuit in *United States* v. *Mohabir*, *supra*, at 1150, there is a substantial probability that the government would not have been able to show petitioner's implied waiver to be a valid relinquishment based on a full comprehension of the consequences. See *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). Since the Eighth Circuit's decision is inconsistent with the views of several other Circuits and since this inconsistency may have been dispositive in petitioner's case, I would grant the petition.

No. 83–5547. ADAMS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 279 S. C. 228, 306 S. E. 2d 208.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the judgment of the Supreme Court of South Carolina insofar as it left undisturbed the death sentence imposed in this case. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). However, even if I believed that the death penalty could be imposed constitutionally under certain circumstances, I nevertheless would grant certiorari because this petition presents an important issue of federal constitutional law, upon which State Supreme Courts and a Federal Court of Appeals are divided.

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[3] Indeed, the Seventh Circuit has concluded that "there is a higher standard imposed to show waiver of the presence of counsel once counsel has been appointed." *United States* v. *Springer*, 460 F. 2d 1344, 1352, cert. denied, 409 U. S. 873 (1972); see also *United States* v. *Patman*, 557 F. 2d 1181, 1182, n. 1 (CA5 1977).

At petitioner's trial, the judge made the following comments on the reasonable-doubt standard:

> "If upon the whole case you have a reasonable doubt as to the guilt of the defendant, he's entitled to that doubt and would be entitled to an acquittal. . . . Now I do not mean, ladies and gentlemen, by the term reasonable doubt that it is some whimsical o[r] imaginary doubt. It is not a weak doubt, it is not a slight doubt. It is a substantial doubt, a doubt for which you give a reason. It is a substantial doubt arising out of the testimony or lack of testimony in the case for which a person honestly seeking to find the truth can give a reason. If you have such a doubt in your mind as to whether the State has proven this defendant guilty, you should resolve that doubt in his favor and write a verdict of not guilty and acquit him.
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> . . . . .
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> ". . . I would tell you that the two phrases reasonable doubt and proof to a moral certainty are synonymous and the legal equivalent of each other. These phrases connote, however, a degree of proof distinguished from an absolute certainty. The reasonable doubt that the law gives the accused is not a weak or a slight doubt, but a strong and well-founded doubt as to the truth of the charge."

These instructions guided the jury when it found petitioner guilty of murder and again at the sentencing hearing when it found beyond a reasonable doubt the existence of two statutory aggravating circumstances.

Petitioner objected to the reasonable-doubt instruction at trial and sought to challenge its constitutionality on appeal to the South Carolina Supreme Court.[1] Having recently upheld similar reasonable-doubt instructions in capital cases, see, *e. g.*, *State* v. *Copeland*, 278 S. C. 572, 300 S. E. 2d 63 (1982); *State* v. *Butler*, 277 S. C. 452, 290 S. E. 2d 1, cert. denied, 455 U. S. 945 (1982), the South Carolina Supreme Court denied petitioner an opportunity to brief or argue the issue, and the court's decision affirming petitioner's convictions and death sentence summarily disposed of petitioner's challenge to the trial court's reasonable-doubt instruction. 279 S. C. 228, 306 S. E. 2d 208 (1983).

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[1] The State argues that petitioner waived his right to object to the reasonable-doubt instruction because, following petitioner's initial objection, the trial court issued a supplementary instruction to which petitioner failed to file a second objection. I discount this argument because South Carolina does not strictly enforce its contemporaneous-objection rule to assignment of legal error in capital cases. See *State* v. *Adams*, 277 S. C. 115, 283 S. E. 2d 582 (1981). Indeed, the court in this case ignored petitioner's failure to object to the trial court's supplementary instruction, and dealt with the claim on the

Last Term, in *Butler* v. *South Carolina*, 459 U. S. 932 (1982) (dissenting from denial of certiorari), I outlined my objections to what apparently has become the standard instruction on reasonable doubt in South Carolina. I continue to believe that trial courts err when they instruct juries that a reasonable doubt means "a substantial doubt" or "a strong and well-founded doubt" or "a doubt for which you give a reason." The Fourteenth Amendment requires prosecutors to prove beyond a reasonable doubt every element of a crime. *In re Winship*, 397 U. S. 358 (1970). When a criminal defendant is convicted by proof beyond a strong or substantial doubt, that defendant has not been afforded the full protections of the Federal Constitution. Moreover, when a jury is told that a reasonable doubt is a doubt that can be articulated, the prosecutor's burden of proof is unconstitutionally eased.

For substantially these reasons, the First Circuit struck down a reasonable-doubt instruction virtually identical to the one given by the trial court in this case. *Dunn* v. *Perrin*, 570 F. 2d 21, cert. denied, 437 U. S. 910 (1978);[2] see also *United States* v. *Flannery*, 451 F. 2d 880, 883 (CA1 1971). The First Circuit noted:

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merits. Under these circumstances, I see no barrier to reviewing South Carolina's disposition of this federal issue.

[2] The instruction at issue in *Dunn* read as follows:

"The term reasonable doubt, as I use it, means just what those words ordinarily imply. It is a doubt which is reasonable and excludes a doubt which is unreasonable. It is such a doubt as for the existence of which a reasonable person can give or suggest a good and sufficient reason. It does not mean a trivial or a frivolous or a fanciful doubt nor one which can be readily or easily explained away, but rather such a strong and abiding conviction as still remains after careful consideration of all the facts and arguments against it and would cause a fair-minded person to refrain from acting in regard to some transaction of importance and seriousness equal to this case." 570 F. 2d, at 23, n. 1.

Although the trial court in *Dunn*, unlike the court at petitioner's trial, likened reasonable doubt to the degree of uncertainty that would cause a prudent per-

> "Th[e] definition of reasonable doubt was the exact inverse of what it should have been. . . . Instead of requiring the government to prove guilt, it called upon petitioners to establish doubt in the jurors' minds. That is an inescapable violation of *In re Winship* . . . ." 570 F. 2d, at 24 (footnote and citations omitted).

Though reviewing a state conviction on collateral review, the *Dunn* panel concluded that the defect in the trial court's instruction was of sufficient magnitude to warrant a retrial. *Id.*, at 25.

The First Circuit's analysis of the reasonable-doubt instructions in *Dunn* directly conflicts with rulings of the South Carolina Supreme Court applied in this case as well as recent decisions of several other State Supreme Courts.[3] Since this conflict is the culmination of chronic disagreement over the correct definition of reasonable doubt,[4] I find this petition an appropriate candidate for review. See this Court's Rule 17.1(b).

I would grant the petition.

No. 83-5833. WEBER *v.* STONY BROOK HOSPITAL ET AL. Ct. App. N. Y. Motion of petitioner to expedite consideration of the

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son to hesitate before making an important personal decision, the First Circuit made clear in its decision that the constitutionally defective portion of the *Dunn* instruction was the equation of a reasonable doubt to a substantial and articulable doubt. *Id.*, at 24-25. In these two respects, the *Dunn* instruction and the instruction given at petitioner's trial are identical. As the instruction in petitioner's case equated reasonable doubt with "a strong and well-founded doubt," the trial court in *Dunn* defined reasonable doubt to be "a strong and abiding conviction." Where petitioner's instruction likened a reasonable doubt to "a doubt for which you can give a reason," the *Dunn* instruction referred to a reasonable doubt as a "doubt as for the existence of which a reasonable person can give or suggest a good and sufficient reason."

[3] See, *e. g.*, *State* v. *Derrico*, 181 Conn. 151, 169-171 434 A. 2d 356, 367-368 (1980); *Stirparo* v. *State*, 287 A. 2d 394 (Del. 1972); *State* v. *Osbey*, 213 Kan. 564, 571-573, 517 P. 2d 141, 148 (1973); *State* v. *Davis*, 482 S. W. 2d 486, 489 (Mo. 1972).

[4] Throughout this century, both federal and state courts have criticized reasonable-doubt instructions similar to the South Carolina charge given in this case. See, *e. g.*, *Taylor* v. *Kentucky*, 436 U. S. 478, 488 (1978); *Pettine* v. *Territory of New Mexico*, 201 F. 489, 495-497 (CA8 1912); *Laird* v. *State*, 251 Ark. 1074, 476 S. W. 2d 811, 813 (1972); *State* v. *Davis*, *supra*, at 490 (Seiler, J., concurring); *Frazier* v. *State*, 117 Tenn. 430, 459-467, 100 S. W. 94, 102-103 (1907); *Owens* v. *Commonwealth*, 186 Va. 689, 704-706, 43 S. E. 2d 895, 902 (1947); *State* v. *McDonald*, 89 Wash. 2d 256, 273-274, 571 P. 2d 930, 940 (1977).

petition for writ of certiorari granted. Certiorari denied. Reported below: 60 N. Y. 2d 208, 456 N. E. 2d 1186.

No. 83–5902 (A–450). WILLIAMS *v.* KING, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Application for stay of execution of sentence of death, addressed to JUSTICE BRENNAN and referred to the Court, denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the application for stay. Certiorari denied. Reported below: 719 F. 2d 730.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 82–2116. DALGETY FOODS, INC. *v.* AVINA, *ante*, p. 801;

No. 83–5026. JACKSON *v.* BUTTERWORTH, SHERIFF OF BROWARD COUNTY, FLORIDA, *ante*, p. 916;

No. 83–5104. TORPY *v.* UNITED STATES, *ante*, p. 856;

No. 83–5369. DONNELL *v.* FREEMAN ET AL., *ante*, p. 941;

No. 83–5375. CHAPMAN *v.* BANK OF THE COMMONWEALTH ET AL., *ante*, p. 923; and

No. 83–5481. CASTRO *v.* FEDERAL DEPOSIT ISURANCE CORPORATION, RECEIVER FOR BANCO CREDITO Y AHORRO PONCENO, ET AL., *ante*, p. 964. Petitions for rehearing denied.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Justice Stewart (retired) to perform judicial duties in the United States Court of Appeals for the First Circuit beginning June 4, 1984, and ending June 8, 1984, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294(a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

DECEMBER 13, 1983

Miscellaneous Order

No. A–455. STEPHENS *v.* KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Application for stay of execution of sentence of death set for Wednesday, December 14, 1983, presented to JUSTICE POWELL, and by him referred to the Court, is granted pending the decision of the United States Court of Appeals for the Eleventh Circuit in *Spencer* v. *Zant*, 715 F. 2d 1562 (1983), rehearing en banc granted, *id.*, at 1583, or until further order of this Court.

JUSTICE POWELL, with whom THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

This is another capital case in the now familiar process in which an application for a stay is filed here within the shadow of the date and time set for execution.

As summarized by the Court of Appeals the relevant facts are:

> "After escaping from county jail, petitioner was interrupted committing a burglary in Twiggs County by his victim whom he and an accomplice robbed, kidnapped, drove into Bleckley County and brutally killed; he was caught the next morning with the murder weapon in his possession. . . . [H]e confessed and pleaded guilty in Twiggs County to armed robbery, kidnapping with bodily injury, and the theft of a motor vehicle . . . ." 721 F. 2d 1300, 1304 (CA11 1983).

A jury convicted applicant of murder and sentenced him to death in early 1975. In the nearly nine years that since have transpired, Stephens has repetitively moved between state and federal courts in pursuing postconviction remedies. His direct and collateral attacks have taken his case through the state court system three times and through the federal system twice. This Court has considered Stephens' case four times excluding his present proceedings. See *Zant* v. *Stephens*, 462 U. S. 862 (1983); *Stephens* v. *Zant*, 454 U. S. 1035 (1981); *Stephens* v. *Hopper*, 439 U. S. 991 (1978); *Stephens* v. *Georgia*, 429 U. S. 986 (1976).

The case before us today commenced with the filing of a federal habeas petition on November 15, 1983, in the United States District Court for the Middle District of Georgia. The State answered the petition and pleaded that Stephens' petition for a writ of habeas corpus was an abuse of the writ. On November 16, 1983, the District Court held a hearing on the abuse question and five days later, on November 21, 1983, the District Court denied relief. 578 F. Supp. 103. It filed a full opinion in which it concluded that "the claims raised by petitioner in his successive petition under 28 U. S. C. § 2254 constitute an abuse of the writ under

Rule 9(b), Rules Governing Section 2254 cases in the United States District Courts,[1] and are hereby DISMISSED in their entirety." *Id.*, at 108. On December 9, 1983, a panel of the Court of Appeals for the Eleventh Circuit considered Stephens' emergency application for a certificate of probable cause to appeal and a stay of execution. Also in a full opinion, the panel found that the District Court had not erred in finding an abuse of the writ. 721 F. 2d 1300 (1983).

Today, the Court of Appeals denied Stephens' request for a rehearing en banc by an evenly divided vote. 722 F. 2d 627. The six judges who dissented from the denial of rehearing filed a brief opinion expressing the view that Stephens had presented a claim that warranted a stay of his execution. The dissent reasoned that Stephens' claim that the Georgia death penalty statute is being applied in an arbitrary and discriminatory manner is identical to the issue in *Spencer* v. *Zant*, 715 F. 2d 1562 (CA11 1983). The Court of Appeals—apparently also today—granted a rehearing en banc in *Spencer* and the dissent argued that Stephens should receive like treatment. It was suggested that Stephens had not abused the writ with respect to this issue because the statistical study on which he bases his claim did not become available until after he had filed his first federal habeas petition. The fact that 6 of the 12 active judges of the Court of Appeals wished to defer action on Stephens' case prompted this Court to grant Stephens' request for a stay. I dissent from this action.

The Court and the judges in dissent in the Court of Appeals apparently misconstrue, as I view it, the posture of this case. We should now be concerned, as was the panel of the Court of Appeals, with whether the District Court erred in its finding that Stephens is guilty of having abused the writ of habeas corpus. In *Sanders* v. *United States*, 373 U. S. 1 (1963), this Court observed that the "abuse of the writ" doctrine should be governed by "equitable principles." *Id.*, at 17. The Court noted that consideration of abuse normally is left to the "discretion of federal trial judges. Theirs is the major responsibility for the just and sound administration of the federal collateral remedies, and theirs must be the judgment as to whether a second or successive application shall be denied without consideration of the merits." *Id.*, at 18.

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[1] Rule 9(b) provides:

"Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."

In determining whether the District Court properly exercised its discretion in finding an abuse we should look not to the merits of a petitioner's claims but to the petitioner's reasons for not having raised the claims in his first habeas proceeding. As the Court of Appeals noted, "[t]here is no disagreement among the parties as to the standard applicable to second and subsequent petitions for habeas corpus which present wholly new issues. In order to constitute abuse, presentation of such issues must result from (1) the intentional withholding or intentional abandonment of those issues on the initial petition or (2) inexcusable neglect." 721 F. 2d, at 1303. Under this analysis, it is clear that the District Court properly dismissed Stephens' claim of discriminatory application of the Georgia death penalty without holding an evidentiary hearing on the merits of that claim.

Apparently Stephens concedes that the equal protection issue is being raised for the first time, but he alleges that a 1980 study by a Dr. David Baldus supports the claim that Georgia's death penalty statute is discriminatorily administered against black citizens. As his excuse for not having raised this issue in his first habeas petition, Stephens states that the study was not made available to the public until 1982.

Stephens' argument sidesteps the crucial issue. The State having alleged that he had abused the writ, the burden rests on Stephens to explain why he did not raise the constitutionality of the application of the death penalty statute in his earlier petition. See *Stephens* v. *Zant*, 631 F. 2d 397 (CA5 1980), modified on rehearing, 648 F. 2d 446 (1981). He did not satisfy this burden in the District Court, in the Court of Appeals, or here. Although it is possible that Stephens did not know about the Baldus study even though it was published in 1982,[2] this does not explain his failure to raise his equal protection claim at all. The availability of such a claim is illustrated by the procedural history in *Spencer* v. *Zant*, *supra*. In *Spencer*, the defendant raised this constitutional challenge to the application of the Georgia death penalty statute in 1978 in his state habeas proceeding and pursued that claim in his first federal habeas petition. *Id.*, at 1579. See also *Ross* v. *Hopper*, 538 F. Supp. 105, 107 (SD Ga. 1982), rev'd and remanded, 716 F. 2d 1528 (CA11 1983).

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[2] The Baldus study, relied upon by Stephens, has not been presented to us. It was made in 1980 and apparently has been available at least since 1982. Although characterized by the judges of the Court of Appeals who dissented from the denial of hearing en banc as a "particularized statistical study" claimed to show "intentional race discrimination," no one has suggested that the study focused on this case. A "particularized" showing would require—as I understand it—that there was *intentional* race discrimination in indicting, trying, and convicting Stephens, and presumably in the state appellate and

Stephens simply failed to explain his failure to raise his claim in his first federal habeas petition, and therefore his case comes squarely within Rule 9(b). In addition, Stephens made no factual showing to the District Court that the statistics contained in the Baldus study supported his allegation of particularized discrimination in the imposition of the death penalty in Georgia.

This Court has now stayed Stephens' execution until the Court of Appeals has decided *Spencer*. In my view, for the reasons noted below, I am satisified that the Court will conclude that *Spencer*—however it may come out—will not control this case.[3] It should be apparent from the decisions of this Court since *Gregg* v. *Georgia*, 428 U. S. 153 (1976), was decided that claims based merely on general statistics are likely to have little or no merit under statutes such as that in Georgia.

That Stephens is innocent of the brutal, execution-style murder, after kidnaping and robbing his victim, is not seriously argued.

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state collateral review that several times followed the trial. If the Baldus study is similar to the several studies filed with us in *Sullivan* v. *Wainwright*, *ante*, p. 109, the statistics in studies of this kind, many of which date as far back as 1948, are merely general statistical surveys that are hardly *particularized* with respect to any alleged "intentional" racial discrimination. Surely, no contention can be made that the entire Georgia judicial system, at all levels, operates to discriminate in all cases. Arguments to this effect may have been directed to the type of statutes addressed in *Furman* v. *Georgia*, 408 U. S. 238 (1972). As our subsequent cases make clear, such arguments cannot be taken seriously under statutes approved in *Gregg* v. *Georgia*, 428 U. S. 153 (1976).

[3] With all respect, I disagree with the judges on the Court of Appeals who say that this case presents the "identical issue" to be considered in *Spencer*. That case is readily distinguishable. As noted above, the discriminatory application of capital punishment—the equal protection issue—*was* raised in the first habeas petition in *Spencer*, and has been pressed at all subsequent stages. In this case, it was not raised until last month. In a fundamental sense, therefore, there could have been no abuse of writ issue in *Spencer*. There are other distinguishing factors, but these need not be stated here.

This is a contest over the application of capital punishment—a punishment repeatedly declared to be constitutional by this Court. In the nearly nine years of repetitive litigation by state and federal courts there has been no suggestion that the death sentence would not be appropriate in this case. Indeed, if on the facts here it was not appropriate, it is not easy to think of a case in which it would be so viewed. Once again, as I indicated at the outset, a typically "last minute" flurry of activity is resulting in additional delay of the imposition of a sentence imposed almost a decade ago. This sort of procedure undermines public confidence in the courts and in the laws we are required to follow.

In conclusion, I reiterate what the Court said in the concluding paragraph in our recent *per curiam* in *Sullivan* v. *Wainwright*, *ante*, at 112: We recognize, of course, as do state and other federal courts, that the death sentence is qualitatively different from all other sentences, and therefore special care is exercised in judicial review. In this case, it is perfectly clear to me that this care *has* been exercised in abundance. Accordingly, I would deny the application for a stay.

DECEMBER 14, 1983

Dismissal Under Rule 53

No. 83-836. GLASSEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 715 F. 2d 352.

Rehearing Denied

No. 83-5544 (A-461). SMITH *v.* KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER, *ante*, p. 1003. Petition for rehearing denied. Application for stay of execution of sentence of death pending disposition of a petition for rehearing, presented to JUSTICE POWELL, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution, grant the petition for rehearing, and vacate the death sentence in this case.

JUSTICE STEVENS, dissenting.

In my opinion all executions in Georgia should be postponed until the United States Court of Appeals for the Eleventh Circuit renders its en banc decision in *Spencer* v. *Zant*, 715 F. 2d 1562 (1983). See *Sanders* v. *United States*, 373 U. S. 1, 15–17 (1963). The "ends of justice would not be served" by the execution of this petitioner while the Court of Appeals is deciding the merits of the claim he asserts. I therefore would grant the stay application.

JANUARY 4, 1984

Dismissal Under Rule 53

No. 83–704. FRANKLIN COMPUTER CORP. *v.* APPLE COMPUTER, INC. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 714 F. 2d 1240.

JANUARY 6, 1984

No. 82–2042. WESTINGHOUSE ELECTRIC CORP. *v.* VAUGHN ET AL. C. A. 8th Cir. [Certiorari granted, *ante*, p. 913.] Writ of certiorari dismissed as to respondent Marion Gee under this Court's Rule 53.

JANUARY 9, 1984

Appeals Dismissed

No. 83–524. WYNMOOR LIMITED PARTNERSHIP ET AL. *v.* COCONUT CREEK CABLE T.V., INC., ET AL. Appeal from Dist. Ct. App. Fla., 4th Dist., dismissed for want of substantial federal question. Reported below: 434 So. 2d 903.

No. 83–694. GONZALEZ *v.* COMMISSION ON JUDICIAL PERFORMANCE OF CALIFORNIA (CALIFORNIA ET AL., REAL PARTIES IN INTEREST). Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. Reported below: 33 Cal. 3d 359, 657 P. 2d 372.

No. 83–715. RIO VISTA NON-PROFIT HOUSING CORP. *v.* COUNTY OF RAMSEY. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. Reported below: 335 N. W. 2d 242.

No. 83–5517. BLATCHFORD *v.* WINANS, WARDEN. Appeal from Sup. Ct. N. M. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 100 N. M. 333, 670 P. 2d 944.

Miscellaneous Orders

No. — - —. Davis *v.* United States et al. Motion to direct the Clerk to file the petition for writ of certiorari that does not comply with the Rules of this Court denied.

No. A-377. Meadows *v.* Redman. Application for bail, addressed to The Chief Justice and referred to the Court, denied.

No. A-485. Scioto Trails Co. et al. *v.* Ohio Department of Liquor Control et al. Ct. App. Ohio, Franklin County. Application for continuation of stay, addressed to Justice Stevens and referred to the Court, denied.

No. A-486. Webb *v.* Hutto. C. A. 4th Cir. Application for stay, addressed to Justice Marshall and referred to the Court, denied.

No. A-490 (83-5958). Keefe, as Guardian ad Litem and Next Friend of Three Juveniles *v.* Massachusetts. Sup. Jud. Ct. Mass. Application for stay, addressed to Justice Blackmun and referred to the Court, denied.

No. D-369. In re Disbarment of Cantagallo. Phillip John Cantagallo, of Ashtabula, Ohio, having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on October 17, 1983 [*ante*, p. 911], is hereby discharged.

No. 96, Orig. Puerto Rico *v.* Iowa. Motion for leave to file bill of complaint denied.

No. 82-963. Massachusetts *v.* Sheppard. Sup. Jud. Ct. Mass. [Certiorari granted, 463 U. S. 1205.] Motion of respondent to strike the brief of Illinois State Bar Association as *amicus curiae* denied.

No. 82-1608. South-Central Timber Development, Inc. *v.* LeResche, Commissioner, Department of Natural Resources of Alaska, et al. C. A. 9th Cir. [Certiorari granted, *ante*, p. 890.] Motion of Pacific Rim Trade Association et al. for leave to file a brief as *amici curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 82–1724. NEW YORK *v.* UPLINGER ET AL. Ct. App. N. Y. [Certiorari granted, *ante*, p. 812.] Motions for leave to file briefs as *amici curiae* by the following were granted: American Psychological Association et al., Center for Constitutional Rights et al., American Civil Liberties Union et al., Committees on Sex and Law et al. of the Association of the Bar of the City of New York, American Association for Personal Privacy et al., Lambda Legal Defense & Education Fund, Inc., and National Association of Business Councils et al.

No. 82–1734. PALMORE *v.* SIDOTI. Dist. Ct. App. Fla., 2d Dist. [Certiorari granted, *ante*, p. 913.] Motion of Leigh Earls et al. for leave to file a brief as *amici curiae* granted.

No. 82–1913. GARCIA *v.* SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY ET AL.; and

No. 82–1951. DONOVAN, SECRETARY OF LABOR *v.* SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY ET AL. D. C. W. D. Tex. [Probable jurisdiction noted, *ante*, p. 812.] Motion of appellees for divided argument denied.

No. 83–128. UNITED STATES *v.* GOUVEIA ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 913.] Motion for appointment of counsel granted, and it is ordered that Joseph F. Walsh, Esquire, of Los Angeles, Cal., be appointed to serve as counsel for respondent Robert Ramirez in this case. Motion for appointment of counsel granted, and it is ordered that Joel Levine, Esquire, of Los Angeles, Cal., be appointed to serve as counsel for respondent Philip Segura in this case. Motion of respondent William Gouveia for leave to proceed *in forma pauperis* granted. Motion for appointment of counsel granted, and it is ordered that Michael J. Treman, Esquire, of Santa Barbara, Cal., be appointed to serve as counsel for respondent William Gouveia in this case. Motion for appointment of counsel granted, and it is ordered that Charles P. Diamond, Esquire, of Los Angeles, Cal., be appointed to serve as counsel for respondents Robert E. Mills and Richard Raymond Pierce in this case. Motion of respondents Robert

E. Mills and Richard Raymond Pierce for divided argument granted. Motion of respondents William Gouveia et al. for divided argument denied.

No. 83-218. REED ET AL. *v.* ROSS. C. A. 4th Cir. [Certiorari granted, *ante*, p. 1007.] Motion for appointment of counsel granted, and it is ordered that Barry Nakell, Esquire, of Boulder, Colo., be appointed to serve as counsel for respondent in this case.

No. 83-346. UNITED STATES *v.* YERMIAN. C. A. 9th Cir. [Certiorari granted, *ante*, p. 991.] Motion for appointment of counsel granted, and it is ordered that Stephen J. Hillman, Esquire, of Los Angeles, Cal., be appointed to serve as counsel for respondent in this case.

No. 83-595. SNOW ET AL. *v.* QUINAULT INDIAN NATION, AKA QUINAULT TRIBE, ET AL. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 83-630. BERNAL *v.* FAINTER, SECRETARY OF STATE OF TEXAS, ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 1007.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 83-778. WAMBHEIM ET AL. *v.* J. C. PENNEY CO., INC. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. JUSTICE BLACKMUN took no part in the consideration or decision of this order.

No. 83-5711. PLATEL *v.* MAGUIRE, VOORHIS & WELLS, P. A., ET AL. Dist. Ct. App. Fla., 5th Dist.; and

No. 83-5725. SWEETMAN *v.* TOWNSHIP OF PENNSAUKEN, NEW JERSEY. Sup. Ct. N. J. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until January 30, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, *ante*, p. 928, we would deny the petitions for certiorari in these cases without reaching the merits of the motions to proceed *in forma pauperis*.

No. 83–5730. MANN *v.* KOOB. Sup. Ct. Colo. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until January 30, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, *ante*, p. 928, we would deny the petition for certiorari in this case without reaching the merits of the motion to proceed *in forma pauperis*.

No. 83–5742. IN RE JACKSON ET AL. Petition for writ of mandamus denied.

No. 83–788. IN RE FLORIDA. Motion of respondent Earl Enmund for leave to proceed *in forma pauperis* granted. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 83–372. FRANCHISE TAX BOARD OF CALIFORNIA *v.* UNITED STATES POSTAL SERVICE. Appeal from C. A. 9th Cir. Probable jurisdiction noted. Reported below: 698 F. 2d 1029.

No. 83–724. GOMEZ-BETHKE, COMMISSIONER, MINNESOTA DEPARTMENT OF HUMAN RIGHTS, ET AL. *v.* UNITED STATES JAYCEES. Appeal from C. A. 8th Cir. Motions of Northwestern Bell Telephone Co. and National Organization for Women et al. for leave to file briefs as *amici curiae* granted. Probable jurisdiction noted. Reported below: 709 F. 2d 1560.

Certiorari Granted

No. 83–305. CALIFORNIA *v.* TROMBETTA ET AL. Ct. App. Cal., 1st App. Dist. Certiorari granted. Reported below: 142 Cal. App. 3d 138, 190 Cal. Rptr. 319.

No. 83–491. IMMIGRATION AND NATURALIZATION SERVICE *v.* LOPEZ-MENDOZA ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 705 F. 2d 1059.

No. 83–710. BERKEMER, SHERIFF OF FRANKLIN COUNTY, OHIO *v.* MCCARTY. C. A. 6th Cir. Certiorari granted. Reported below: 716 F. 2d 361.

No. 83–751. SECURITIES AND EXCHANGE COMMISSION ET AL. *v.* JERRY T. O'BRIEN, INC., ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 704 F. 2d 1065.

No. 83–226. ARIZONA *v.* RUMSEY. Sup. Ct. Ariz. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 136 Ariz. 166, 665 P. 2d 48.

No. 83–5596. SPAZIANO *v.* FLORIDA. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 433 So. 2d 508.

Certiorari Denied. (See also No. 83–5517, *supra.*)

No. 82–6991. REED *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 699 F. 2d 1017.

No. 83–324. MICHAEL CONSTRUCTION CO. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 8th Cir. Certiorari denied. Reported below: 706 F. 2d 244.

No. 83–356. REY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 706 F. 2d 145.

No. 83–385. CLARK *v.* DOLE, SECRETARY OF TRANSPORTATION. C. A. D. C. Cir. Certiorari denied. Reported below: 230 U. S. App. D. C. 70, 713 F. 2d 864.

No. 83–403. SASSCER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 714 F. 2d 134.

No. 83–411. GULF OIL CORP. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 706 F. 2d 444.

No. 83–413. CONTINENTAL AIRLINES, INC. *v.* ZIMMERMAN, TRUSTEE OF LUDWIG HONOLD MANUFACTURING CO., DEBTOR. C. A. 3d Cir. Certiorari denied. Reported below: 712 F. 2d 55.

No. 83–419. BOULIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 707 F. 2d 511.

No. 83–424. PRESLEY *v.* GEOPHYSICAL SERVICE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 709 F. 2d 406.

No. 83–442. HILL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 716 F. 2d 893.

No. 83–446. AL BRYANT, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 711 F. 2d 543.

No. 83–447. SEA-LAND SERVICE, INC. *v.* AKERMANIS. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1431.

No. 83–450. HULL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 668.

No. 83–464. LEE *v.* MONSEN, DEPUTY CHIEF OF THE ELMHURST POLICE DEPARTMENT, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 714 F. 2d 148.

No. 83–476. IAVARONE *v.* UNITED STATES; and

No. 83–636. BATTISTI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: No. 83-476, 720 F. 2d 668; No. 83-636, 720 F. 2d 667.

No. 83–479. KAN *v.* LANDON. C. A. 9th Cir. Certiorari denied. Reported below: 711 F. 2d 1065.

No. 83–492. MOBILE HOME ESTATES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 707 F. 2d 264.

No. 83–493. AMERADA HESS CORP. ET AL. *v.* GREEN. C. A. 5th Cir. Certiorari denied. Reported below: 707 F. 2d 201.

No. 83–496. WILFORD ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 710 F. 2d 439.

No. 83–497. KALY *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 83–504. FIELD CONTAINER CORP. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 712 F. 2d 250.

No. 83–525. JONES ET AL. *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 709 F. 2d 1516.

No. 83–530. THOMPSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 710 F. 2d 915.

No. 83-537. MASSACHUSETTS LABORERS DISTRICT COUNCIL ET AL. *v.* ABREEN CORP. ET AL.; and

No. 83-693. LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO *v.* ABREEN CORP. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 709 F. 2d 748.

No. 83-542. LANGFORD ET AL. *v.* JAMES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 701 F. 2d 123.

No. 83-546. CLAYCO PETROLEUM CORP. ET AL. *v.* OCCIDENTAL PETROLEUM CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 712 F. 2d 404.

No. 83-551. BRATTON ET AL. *v.* CITY OF DETROIT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 704 F. 2d 878.

No. 83-553. ARNOLD ET AL. *v.* EASTERN AIR LINES, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 712 F. 2d 899.

No. 83-559. MASTER PRINTERS ASSN., A DIVISION OF PRINTING INDUSTRY OF ILLINOIS *v.* DONOVAN, SECRETARY OF LABOR. C. A. 7th Cir. Certiorari denied. Reported below: 699 F. 2d 370.

No. 83-565. INGLIS *v.* FEINERMAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 701 F. 2d 97.

No. 83-578. ALASKA LAND TITLE ASSN. ET AL. *v.* ALASKA ET AL. Sup. Ct. Alaska. Certiorari denied. Reported below: 667 P. 2d 714.

No. 83-580. BRISLAWN *v.* BRISLAWN. Sup. Ct. Ala. Certiorari denied. Reported below: 443 So. 2d 32.

No. 83-598. MAZZOLA ET AL. *v.* DONOVAN, SECRETARY OF LABOR. C. A. 9th Cir. Certiorari denied. Reported below: 716 F. 2d 1226.

No. 83-601. KATSOUGRAKIS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 715 F. 2d 769.

No. 83-602. BRIGGS ET AL. *v.* GOODWIN. C. A. D. C. Cir. Certiorari denied. Reported below: 229 U. S. App. D. C. 412, 712 F. 2d 1444.

No. 83-606. CITY OF MISSION, SOUTH DAKOTA, ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 716 F. 2d 907.

No. 83-607. IDAHO *v.* BRADLEY. Sup. Ct. Idaho. Certiorari denied. Reported below: 106 Idaho 358, 679 P. 2d 635.

No. 83-618. SCHMIDT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 711 F. 2d 595.

No. 83-621. CONSTANT *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 714 F. 2d 162.

No. 83-633. ROBERT K. BELL ENTERPRISES, INC. *v.* DONOVAN, SECRETARY OF LABOR, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 710 F. 2d 673.

No. 83-638. ALCAN ALUMINUM LTD. *v.* FRANCHISE TAX BOARD OF CALIFORNIA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1430.

No. 83-648. ALASKA NORTHERN DEVELOPMENT, INC. *v.* ALYESKA PIPELINE SERVICE CO. Sup. Ct. Alaska. Certiorari denied. Reported below: 666 P. 2d 33.

No. 83-649. TAMILIO *v.* FOGG, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 713 F. 2d 18.

No. 83-656. CARIBE TUGBOAT CORP. ET AL. *v.* DUFFY. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 427 So. 2d 227.

No. 83-659. PAUL ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 714 F. 2d 153.

No. 83-677. SUPERIOR OIL CO. *v.* PIONEER CORP. C. A. 5th Cir. Certiorari denied. Reported below: 706 F. 2d 603.

No. 83-686. TRAVELERS INDEMNITY CO. *v.* EWING, COLE, ERDMAN & EUBANK. C. A. 3d Cir. Certiorari denied. Reported below: 711 F. 2d 14.

No. 83-687. ERNST *v.* INDIANA BELL TELEPHONE CO., INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 714 F. 2d 150.

No. 83-688. GREENE *v.* WHIRLPOOL CORP. C. A. 4th Cir. Certiorari denied. Reported below: 708 F. 2d 128.

No. 83-689. SOUTH DAKOTA ET AL. *v.* LOWER BRULE SIOUX TRIBE. C. A. 8th Cir. Certiorari denied. Reported below: 711 F. 2d 809.

No. 83-698. BURROUGHS CORP. *v.* A. B. DICK CO. C. A. Fed. Cir. Certiorari denied. Reported below: 713 F. 2d 700.

No. 83-700. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* PAWLAK ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 713 F. 2d 972.

No. 83-701. LAREDO JUNIOR COLLEGE ET AL. *v.* PEREZ. C. A. 5th Cir. Certiorari denied. Reported below: 706 F. 2d 731.

No. 83-705. DIRON *v.* CITY OF EASTLAKE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 718 F. 2d 1098.

No. 83-708. QUINAULT PACIFIC CORP. *v.* BARCLAYS AMERICAN/BUSINESS CREDIT, INC., ET AL. C. A. 11th Cir. Certiorari denied.

No. 83-716. CATON *v.* CATON. Ct. App. Okla. Certiorari denied.

No. 83-720. HUMPHREYS (CAYMAN), LTD., ET AL. *v.* LEHMAN, EXECUTRIX OF THE ESTATE OF LEHMAN. C. A. 8th Cir. Certiorari denied. Reported below: 713 F. 2d 339.

No. 83-721. DAVIDSON *v.* CONNECTICUT BANK & TRUST CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1430.

No. 83-726. FIRST AMERICAN TITLE COMPANY OF SOUTH DAKOTA ET AL. *v.* SOUTH DAKOTA LAND TITLE ASSN. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 714 F. 2d 1439.

No. 83-729. HANSEN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 83-731. KIZAS ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 227 U. S. App. D. C. 327, 707 F. 2d 524.

No. 83-732. BOYD *v.* LEHMAN, SECRETARY OF THE NAVY. C. A. 11th Cir. Certiorari denied. Reported below: 709 F. 2d 684.

No. 83-733. ENVIRONMENTAL DESIGNS, LTD., ET AL. *v.* UNION OIL COMPANY OF CALIFORNIA ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 713 F. 2d 693.

No. 83-735. LONGE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 96 App. Div. 2d 763, 465 N. Y. S. 2d 795.

No. 83-739. THOMPSON, ADMINISTRATRIX OF THE ESTATE OF THOMPSON *v.* INTERNATIONAL HARVESTER CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 703 F. 2d 572.

No. 83-743. ARIZONA PUBLIC SERVICE CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 2d 1228.

No. 83-745. RICHARDS *v.* HOWARD UNIVERSITY ET AL. C. A. D. C. Cir. Certiorari denied.

No. 83-746. RICHARDS *v.* HOWARD UNIVERSITY ET AL. Ct. App. D. C. Certiorari denied.

No. 83-749. FAIRDALE FARMS, INC. *v.* YANKEE MILK, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 715 F. 2d 30.

No. 83-750. CARTER, DBA CARTER ENTERPRISES OF DENVER *v.* SMALL BUSINESS ADMINISTRATION ET AL. Ct. App. Colo. Certiorari denied.

No. 83-752. TRANSOCEAN CONTRACTORS, INC., ET AL. *v.* REED. C. A. 5th Cir. Certiorari denied. Reported below: 712 F. 2d 1414.

No. 83-753. FONTANA *v.* BARHAM ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 707 F. 2d 221.

No. 83-754. MCKAY, EXECUTRIX OF THE ESTATE OF MCKAY, ET AL. *v.* ROCKWELL INTERNATIONAL CORP. C. A. 9th Cir. Certiorari denied. Reported below: 704 F. 2d 444.

No. 83-756. BLEVINS *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 83-757. McCANN *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 167 Ga. App. 368, 306 S. E. 2d 681.

No. 83-759. HURLEY ET AL. *v.* ALBUQUERQUE TITLE CO., INC., ET AL. Ct. App. N. M. Certiorari denied.

No. 83-761. HARRIS ET AL. *v.* FENN ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 83-762. LAFALCE *v.* HOUSTON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 712 F. 2d 292.

No. 83-765. DURHAM COUNTY BOARD OF ALCOHOLIC CONTROL *v.* WELLS. C. A. 4th Cir. Certiorari denied. Reported below: 714 F. 2d 340.

No. 83-771. OHIO-SEALY MATTRESS MANUFACTURING CO. ET AL. *v.* SEALY, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 714 F. 2d 740.

No. 83-775. GUSTINE *v.* GUSTINE. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 83-776. OZIEMKIEWICZ *v.* WASHINGTON, MAYOR OF CHICAGO, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 718 F. 2d 1103.

No. 83-777. CLARK EQUIPMENT CO. *v.* KELLER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 715 F. 2d 1280.

No. 83-780. DANTZLER *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 83-782. DALE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1439.

No. 83-785. CREEL, TRUSTEE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 711 F. 2d 575.

No. 83-787. GINSBURG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 720 F. 2d 681.

No. 83-794. ERFTMIER *v.* ROWAN COS., INC. C. A. 5th Cir. Certiorari denied. Reported below: 712 F. 2d 1414.

No. 83-811. BRIMM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 711 F. 2d 1069.

No. 83-815. GRIMM ET AL. *v.* RIZK ET AL. Ct. App. Tex., 14th Sup. Jud. Dist. Certiorari denied. Reported below: 640 S. W. 2d 711.

No. 83-816. MERAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 719 F. 2d 403.

No. 83-820. PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA *v.* MORGADO. C. A. 11th Cir. Certiorari denied. Reported below: 706 F. 2d 1184.

No. 83-828. SHELL OIL CO. *v.* OLSEN ET AL.; and

No. 83-829. MOVIBLE OFFSHORE, INC. *v.* OLSEN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 708 F. 2d 976.

No. 83-834. SACK *v.* KIMBERLY-CLARK CORP. C. A. 7th Cir. Certiorari denied. Reported below: 714 F. 2d 150.

No. 83-855. WHITE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 715 F. 2d 578.

No. 83-865. CANNON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 715 F. 2d 1228.

No. 83-872. CROSBY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 714 F. 2d 185.

No. 83-891. CREASON, DBA KANSAS CARTAGE *v.* MO-KAN TEAMSTERS PENSION FUND ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 716 F. 2d 772.

No. 83-901. RUSSO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 722 F. 2d 736.

No. 83-5100. LINFIELD *v.* BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 1442.

No. 83-5140. SMITH *v.* HEERINGA ET AL. C. A. 7th Cir. Certiorari denied.

No. 83-5188. WASHINGTON *v.* NEW YORK STATE COMMISSIONER OF CORRECTIONAL SERVICES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1430.

No. 83-5216. SANTIAGO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 711 F. 2d 1052.

No. 83–5282. Byers *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 229 U. S. App. D. C. 142, 711 F. 2d 420.

No. 83–5289. Lambertis *v.* Virgin Islands. C. A. 3d Cir. Certiorari denied. Reported below: 714 F. 2d 122.

No. 83–5317. Owens *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 83–5338. Anderson *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 83–5341. Greene *v.* Massey, Superintendent, Union Correctional Institute. C. A. 5th Cir. Certiorari denied. Reported below: 706 F. 2d 548.

No. 83–5357. Cash *v.* Bachtell, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 714 F. 2d 128.

No. 83–5364. Hamid *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 461 A. 2d 1043.

No. 83–5386. Turel *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 711 F. 2d 1060.

No. 83–5390. Green *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 141 Cal. App. 3d 224, 190 Cal. Rptr. 211.

No. 83–5400. Sellner *v.* Hudnall et al. Ct. Sp. App. Md. Certiorari denied. Reported below: 53 Md. App. 758.

No. 83–5437. Clayton et al. *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 652 S. W. 2d 950.

No. 83–5442. Rogers *v.* Rulo et al. C. A. 8th Cir. Certiorari denied. Reported below: 712 F. 2d 363.

No. 83–5448. Williams *v.* Pierce, Secretary of Housing and Urban Development, et al. C. A. 2d Cir. Certiorari denied. Reported below: 708 F. 2d 57.

No. 83–5470. Weathersby *v.* Morris, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 708 F. 2d 1493.

No. 83–5508. Patterson *v.* Koehler, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 718 F. 2d 1100.

No. 83–5511. WALKER *v.* UNITED STATES; and
No. 83–5565. STEARNS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 707 F. 2d 391.

No. 83–5514. MARGOLIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 706 F. 2d 886.

No. 83–5523. DUNCAN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 436 So. 2d 883.

No. 83–5524. JOHNSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 718 F. 2d 1102.

No. 83–5536. KAJEVIC *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 711 F. 2d 767.

No. 83–5549. CANTRELL *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 426 So. 2d 1035.

No. 83–5551. WARD *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 114 Wis. 2d 589, 337 N. W. 2d 855.

No. 83–5566. EUGE *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 716 F. 2d 908.

No. 83–5570. THOMA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 713 F. 2d 604.

No. 83–5603. KELLY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 714 F. 2d 157.

No. 83–5612. ROBINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 716 F. 2d 1095.

No. 83–5622. GODEK *v.* UNITED STATES. Sup. Ct. N. Y., Suffolk County. Certiorari denied. Reported below: 113 Misc. 2d 599, 449 N. Y. S. 2d 428.

No. 83–5623. CHAPIN *v.* MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 704 F. 2d 335.

No. 83–5631. LEGRAND *v.* MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 720 F. 2d 679.

No. 83–5632. MALLORY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 437 So. 2d 595.

No. 83–5635. KEMP *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 714 F. 2d 140.

No. 83–5641. SYDNOR *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 54 Md. App. 749.

No. 83–5643. NEELY *v.* ISRAEL, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION. C. A. 7th Cir. Certiorari denied. Reported below: 715 F. 2d 1261.

No. 83–5646. WATERS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 83–5651. DAYE *v.* ATTORNEY GENERAL OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 712 F. 2d 1566.

No. 83–5656. JOHNSON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 438 So. 2d 833.

No. 83–5660. SLOAN *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 710 F. 2d 229.

No. 83–5664. SIKORSKI *v.* DEN NORSKE AMERIKALINJE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 708 F. 2d 732.

No. 83–5665. SOUZA *v.* ELLERTHORPE, WARDEN, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 712 F. 2d 1529.

No. 83–5667. MANIS ET AL. *v.* CHIEF JUDGE, CIRCUIT COURT OF GREENE COUNTY, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 711 F. 2d 108.

No. 83–5672. BAKER *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 711 F. 2d 44.

No. 83–5675. KEMP ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 713 F. 2d 39.

No. 83–5676. GANT *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 83–5677. McQueen *v.* Dixon et al. C. A. 11th Cir. Certiorari denied. Reported below: 716 F. 2d 913.

No. 83–5682. Aldrich *v.* National Society for Children and Adults With Autism et al. C. A. 4th Cir. Certiorari denied. Reported below: 716 F. 2d 894.

No. 83–5684. Harris *v.* Mississippi. Sup. Ct. Miss. Certiorari denied. Reported below: 435 So. 2d 689.

No. 83–5686. Ingram *v.* Alabama. Ct. Crim. App. Ala. Certiorari denied. Reported below: 437 So. 2d 128.

No. 83–5687. McCrary *v.* New York. Ct. App. N. Y. Certiorari denied. Reported below: 60 N. Y. 2d 617, 454 N. E. 2d 947.

No. 83–5690. Wilson *v.* Maryland. C. A. 4th Cir. Certiorari denied. Reported below: 714 F. 2d 135.

No. 83–5691. Campbell *v.* Heckler, Secretary of Health and Human Services. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 660.

No. 83–5692. Bujol *v.* Cain, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 713 F. 2d 112.

No. 83–5694. Aiken *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 83–5698. Conti *v.* Ingersoll Rand Co. et al. C. A. 3d Cir. Certiorari denied.

No. 83–5700. Molasky *v.* Missouri. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 655 S. W. 2d 663.

No. 83–5702. Barnett *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 715 F. 2d 1164.

No. 83–5707. Gambles *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 717 F. 2d 1400.

No. 83–5712. Roberson *v.* McKaskle, Acting Director, Texas Department of Corrections. C. A. 5th Cir. Certiorari denied. Reported below: 717 F. 2d 1397.

No. 83–5715. Fleshman *v.* Heckler, Secretary of Health and Human Services. C. A. 5th Cir. Certiorari denied. Reported below: 709 F. 2d 999.

No. 83–5719. CONGER *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 441 So. 2d 218.

No. 83–5721. FORDHAM *v.* NATIONAL BANK OF BOYERTOWN. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 662.

No. 83–5722. HALL *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 54 Md. App. 738.

No. 83–5724. BALTSAVIAS *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1433.

No. 83–5731. SUMRALL *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 55 Md. App. 771.

No. 83–5732. VANN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 714 F. 2d 158.

No. 83–5734. MARTEL ET AL. *v.* NEW HAMPSHIRE ET AL. Sup. Ct. N. H. Certiorari denied.

No. 83–5738. DE NOBILI ET AL. *v.* CUNNINGHAM & O'CONNOR MORTUARY ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 83–5740. LAMPKINS *v.* GAGNON, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 710 F. 2d 374.

No. 83–5743. SLAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 714 F. 2d 1093.

No. 83–5745. THEZAN *v.* MARITIME OVERSEAS CORP. C. A. 5th Cir. Certiorari denied. Reported below: 708 F. 2d 175.

No. 83–5746. WARD *v.* OWENS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 718 F. 2d 1094.

No. 83–5747. VENERI *v.* BRACKMAN, JUDGE, ET AL. C. A. 8th Cir. Certiorari denied.

No. 83–5748. THOMPSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 710 F. 2d 1500.

No. 83–5752. VELLA *v.* UNITED STATES FEDERAL BUREAU OF INVESTIGATION OF TAMPA, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 716 F. 2d 913.

No. 83-5753. THOMAS *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 83-5756. REINER *v.* BIDLACK ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1507.

No. 83-5757. CAMPBELL *v.* GUY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 711 F. 2d 1055.

No. 83-5759. GRAHAM *v.* EAST ORANGE C. E. T. A. C. A. 9th Cir. Certiorari denied.

No. 83-5760. HILLIE *v.* MAGGIO, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 712 F. 2d 182.

No. 83-5762. LILLEY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 96 App. Div. 2d 714, 465 N. Y. S. 2d 369.

No. 83-5763. GOMEZ-DIAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 712 F. 2d 949.

No. 83-5766. GENTSCH *v.* CLARK ET AL. C. A. 5th Cir. Certiorari denied.

No. 83-5769. LONG *v.* RISON, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 717 F. 2d 1400.

No. 83-5775. O'BRIEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 722 F. 2d 742.

No. 83-5777. ANDERSON *v.* DISTRICT COURT, IN AND FOR THE COUNTY OF JEFFERSON, COLORADO. Sup. Ct. Colo. Certiorari denied.

No. 83-5779. THEISEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 713 F. 2d 394.

No. 83-5781. SMITH *v.* UNITED STATES CIVIL SERVICE COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 716 F. 2d 892.

No. 83-5786. RUFF *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 717 F. 2d 855.

No. 83-5798. ARNOLD *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 83-5800. McKNIGHT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 83-5801. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 717 F. 2d 1397.

No. 83-5803. TALBERT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 710 F. 2d 528.

No. 83-5805. HAWKINS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 461 A. 2d 1025.

No. 83-5812. FOSTER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 436 So. 2d 56.

No. 83-5817. BENDER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 720 F. 2d 681.

No. 83-5822. BLANCO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 714 F. 2d 154.

No. 83-5828. SOWARDS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 722 F. 2d 743.

No. 83-5834. QUINTANA-SAMANIEGO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 718 F. 2d 1095.

No. 83-5839. GODWIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 710 F. 2d 839.

No. 83-207. ARIYOSHI, GOVERNOR OF HAWAII, ET AL. *v.* PEKARSKY ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 695 F. 2d 352.

No. 83-783. DAVIS *v.* GLADSTONE ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 714 F. 2d 512.

No. 83-243. BROWN & ROOT, INC., ET AL. *v.* THORNTON ET AL. C. A. 5th Cir. Motions of respondents Billy Thornton and James Broussard for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 707 F. 2d 149.

No. 83-382. RUSH *v.* UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT ET AL. C. A. D. C. Cir. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 227 U. S. App. D. C. 325, 706 F. 2d 1229.

No. 83–459. WASHINGTON STATE CHARTERBOAT ASSN. *v.* BALDRIGE, SECRETARY OF COMMERCE. C. A. 9th Cir. Motion of Quileute Indian Tribe et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 702 F. 2d 820.

No. 83–506. MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* VELA. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 708 F. 2d 954.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, dissenting.

This petition presents the important question whether the exhaustion rule in 28 U. S. C. §§ 2254(b), (c), prohibits federal courts from considering federal habeas corpus petitions that contain specific allegations of error that are integral to the constitutional challenge but were not raised in the state courts. Because the question has great significance for the relations between federal and state courts, I would grant the petition for certiorari.

I

Respondent, Conrado Vela, pleaded guilty to a Texas murder indictment. After a jury found he had killed with malice, respondent was sentenced to 99 years' imprisonment. The conviction was upheld on direct appeal. See *Vela* v. *State*, 516 S. W. 2d 176 (Tex. Crim. App. 1974). Respondent then filed consecutive petitions for writs of habeas corpus in state and federal courts, alleging ineffective assistance of counsel. In both petitions, respondent raised the same three allegations of error as support for his ineffective-assistance-of-counsel claim. Both the state courts and the Federal District Court found that the three errors, when considered in the context of the entire record, were not cumulatively of such magnitude to render counsel's conduct of the trial as a whole constitutionally infirm. The courts also held that respondent was not prejudiced from any inadequacy that could be found. See *Ex parte Vela*, Application No. 9209, pp. 20–22 (June 4, 1980) (state court); Supp. App. to Pet. for Cert. E–1—E–8 (Federal District Court).

Respondent appealed to the Court of Appeals for the Fifth Circuit, presenting the same three allegations of counsel error and, for the first time, raising other allegations of error as well. The Court of Appeals decided that the exhaustion requirement of 28 U. S. C. §§2254(b), (c), did not prevent it from considering the additional instances of alleged ineffective assistance. Though these additional instances of ineffectiveness had not specifically been brought to the attention of the state courts, the Court of Appeals noted that the alleged errors were contained in the trial record and that the state courts purportedly had reviewed the entire record in finding counsel's performance adequate in the "totality of the circumstances." Thus, the Court of Appeals concluded that "the alleged 'new facts' [were] not new at all," and that respondent had exhausted all available state remedies. *Vela* v. *Estelle*, 708 F. 2d 954, 960 (1983). On the merits, it found that respondent had received ineffective assistance at trial because his counsel had committed the three "central errors" raised in the state-court petition and "several other serious errors as well." *Id.*, at 961–965. The court concluded that respondent had suffered prejudice of sufficient magnitude to warrant granting a writ of habeas corpus. *Id.*, at 965–966.

II

Whatever the correctness of the Court of Appeals' "ineffective assistance" determination, see Supp. App. to Pet. for Cert. E–2—E–8, this petition raises an issue of considerable importance to the administration of federal habeas corpus. The Fifth Circuit's consideration of factual allegations not specifically raised in the state court undermines the policies behind the requirement that state remedies be exhausted before federal habeas corpus relief becomes available.

The exhaustion rule "reflects a policy of federal-state comity" that is fundamental to our federal system. *Picard* v. *Connor*, 404 U. S. 270, 275 (1971). It "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." *Duckworth* v. *Serrano*, 454 U. S. 1, 3 (1981) *(per curiam)*. For the State to have that opportunity, "the federal claim must be fairly presented to the state courts." *Picard* v. *Connor*, *supra*, at 275. A federal habeas petitioner making a claim critically dependent on specific allegations of error never brought to the state court's attention has not "fairly presented" that claim. See *Rose* v. *Lundy*, 455 U. S. 509, 526–527, 531–532 (1982) (BLACKMUN, J., concurring in judgment) (interrelated claims requiring exhaustion are those necessitating examination of the entire record). Upsetting a state-court criminal conviction on the basis of such allegations improperly usurps the state courts' role in the enforcement of federal law.

Of course, the state courts have the entire record, and thus the essential facts, before them in *every* constitutional case. But that is obviously beside the point. The exhaustion rule requires that the habeas petitioner do more than make available to the state courts all facts necessary to support a claim. It requires the petitioner to identify for the state courts' attention the constitutional claim alleged to be inherent in those facts. See *Picard* v. *Connor*, *supra*, at 277. Much as with our rules on direct review, the exhaustion rule requires that the habeas petitioner, and not the state-court judges, bear the burden of severing the bad from the good and of raising those errors supportive of an alleged constitutional claim. See *Webb* v. *Webb*, 451 U. S. 493, 499–501 (1981) (principle of comity behind "properly-raised-federal-question" doctrine similar to principle behind exhaustion doctrine). When the state courts are not informed of the specific errors on which a constitutional claim is based, it cannot be said that they were given a fair opportunity to consider the claim in the same posture as was the federal court.

That state courts evaluate the assistance of counsel in the context of the entire trial record cannot mean that the exhaustion requirement is satisfied. In *Rose* v. *Lundy*, *supra*, at 519, we said that an exhausted claim could not be considered by a federal habeas court if the claim depended in part on another claim not raised in the state courts, even if the state courts, in rejecting the exhausted claim, had reviewed the entire record. The exhaustion rule requires that the substance of a federal habeas corpus claim first be presented to the state courts, *Picard* v. *Connor*, *supra*, at 278, and the substance of an ineffective-assistance-of-counsel claim is identified by the list of alleged errors committed by counsel. See *Domaingue* v. *Butterworth*, 641 F. 2d 8, 12–13 (CA1 1981). Unless the state courts have been pointed to a particular error of counsel, a claim based on that error is unexhausted.

A Federal Rule requires habeas petitioners "to set forth in summary form the facts supporting each of the grounds thus specified." 28 U. S. C. § 2254 Rule 2(c). For federal habeas law to demand less of the petitioner when in state court is inconsistent with the premise of that Rule—that courts are entitled to be notified of the specific basis of a claim, especially if the claim is one for extraordinary relief. See also Fed. Rule Evid. 103(a)(1). It is also inconsistent with the premise of the exhaustion doctrine—that state courts provide the primary forum for the adjudication of claims of even federal error in state criminal proceedings. See *Rose* v. *Lundy, supra*.

Ineffective-assistance-of-counsel claims are becoming as much a part of state and federal habeas corpus proceedings as the bailiffs' call to order in those courts. Furthermore, other constitutional claims—for example, the right to confrontation, the right to a fair trial, and the right to an impartial tribunal—likewise rest on specific allegations of error and often require review of the entire record as part of the constitutional examination. The Court of Appeals' questionable approach to the exhaustion rule of 28 U. S. C. §§ 2254(b), (c), would apply to these claims as well. I would grant the petition for certiorari to consider the Court of Appeals' holding in light of its potential for interference with the relations of state and federal courts.

No. 83–533. NICHOLSON *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. D. C. Cir. Motions of American Farm Bureau Federation et al. and Louisiana Landmarks Society for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 229 U. S. App. D. C. 86, 711 F. 2d 364.

No. 83–589. HOPI INDIAN TRIBE *v.* BLOCK, SECRETARY OF AGRICULTURE, ET AL.; and

No. 83–669. NAVAJO MEDICINEMEN'S ASSN. ET AL. *v.* BLOCK, SECRETARY OF AGRICULTURE, ET AL. C. A. D. C. Cir. Motion of All Indian Pueblo Council et al. for leave to file a brief as *amici curiae* in No. 83–589 granted. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this motion and these petitions. Reported below: 228 U. S. App. D. C. 166, 708 F. 2d 735.

No. 83–692. LOCAL UNION NO. 47, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL. Sup. Ct. Cal. Motion of petitioner to dispense with printing the full opinion below granted. Certiorari denied. JUSTICE REHNQUIST took no part in the consideration or decision of this motion and this petition.

No. 83–725. FREY, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL FACILITY *v.* ANDERSON. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 715 F. 2d 1304.

No. 83–748. IN RE DELGADO. Sup. Ct. S. C. Motion of National Association of Criminal Defense Lawyers, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 279 S. C. 293, 306 S. E. 2d 591.

No. 83–830. LIMBACH, TAX COMMISSIONER OF OHIO *v.* BOOTHE FINANCIAL CORP. Sup. Ct. Ohio. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 6 Ohio St. 3d 247, 452 N. E. 2d 1295.

No. 83–5365. YOUNG *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 251 Ga. 153, 303 S. E. 2d 431.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

I dissent from the Court's denial of certiorari because it lets stand a ruling of the Georgia Supreme Court which violates the Double Jeopardy Clause of the Fifth Amendment as made applicable to the States through the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U. S. 784, 794 (1969). Because of the Georgia Supreme Court's blatant misreading of a decision by the United States Court of Appeals which granted habeas corpus relief to the petitioner, he will again be subjected to the State's attempt to impose a death sentence upon him even though a Federal District Court has made an undisturbed ruling that a death sentence recommended by a jury was invalid due to insufficiency of the evidence.

In February 1976, the petitioner, Charlie Young, Jr., was convicted of murder, armed robbery, and robbery by intimidation. At the sentencing phase of the trial, the jury condemned the petitioner to death after finding that the murder was accompanied by two statutorily defined aggravating circumstances: the murder was committed while the petitioner was engaged in the commission of another capital felony, Ga. Code Ann. § 17–10–30(b)(2)

(1982), and the petitioner committed the murder for the purpose of receiving money, § 17-10-30(b)(4).[1] The Supreme Court of Georgia affirmed the conviction and the sentence. *Young* v. *State*, 237 Ga. 852, 230 S. E. 2d 287 (1976). Subsequently, the Supreme Court of Georgia affirmed a lower state court's denial of Young's application for habeas corpus relief. *Young* v. *Ricketts*, 242 Ga. 559, 250 S. E. 2d 404 (1978), cert. denied *sub nom. Young* v. *Zant*, 442 U. S. 934 (1979).

Young then initiated habeas corpus proceedings in the United States District Court for the Middle District of Georgia. The District Court rejected Young's challenge to the validity of his conviction but set aside his death sentence. *Young* v. *Zant*, 506 F. Supp. 274 (1980). The District Court's order was based upon two holdings. First, the court held that Young had been denied effective assistance of counsel at the sentencing stage of his trial, in violation of the Sixth and Fourteenth Amendments to the Federal Constitution. *Id.*, at 278.[2] Second, the District Court held that the evidence presented at trial "was not legally sufficient to support the jury's finding beyond a reasonable doubt that the murder was committed *in the course of* an armed robbery or *for the purpose of* obtaining money." *Id.*, at 280 (emphasis in original).

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[1] In addition to the death sentence, the jury also sentenced Young to life imprisonment for armed robbery and to 20 years' imprisonment for robbery by intimidation.

[2] The District Court found that the petitioner's attorney had no understanding whatsoever of the Georgia capital trial and sentencing procedures. In a capital case in Georgia, there is first a trial to determine the guilt or innocence of the defendant. A separate sentencing hearing follows a determination of guilt. In effect, capital sentencing is a trial on the issue of punishment, embodying the hallmarks of the trial on guilt or innocence. See *infra*, at 1061-1062.

The petitioner's attorney failed to present *any* evidence during the sentencing hearing in mitigation of punishment, and refused to allow the petitioner to take the stand in his own behalf, thereby depriving the petitioner of the only sentencing phase witness for the defense—the petitioner himself. *Young* v. *Zant*, 506 F. Supp., at 278-280.

The District Court rejected the petitioner's claim that he had been deprived of effective assistance of counsel at the guilt-or-innocence phase of the trial, finding that the petitioner's attorney afforded him "reasonably effective assistance." *Id.*, at 278. This finding, however, is inconsistent with the court's observation that the petitioner's attorney "had no apparent understanding whatsoever of the bifurcated nature of the Georgia capital trial and sentencing procedures," *id.*, at 278-279, and that the attorney had used the utterly ridiculous strategy of admitting guilt but pleading for a life sentence at the guilt phase of the trial. *Id.*, at 279. Subsequently, the Court of Appeals reversed this finding, holding instead that the petitioner had also been denied effective assistance at the guilt phase of his trial. *Young* v. *Zant*, 677 F. 2d 792 (CA11 1982).

The United States Court of Appeals reversed the District Court's rejection of Young's challenge to his conviction. *Young* v. *Zant*, 677 F. 2d 792 (CA11 1982). The Court of Appeals held that Young had also been denied effective assistance of counsel at the guilt phase of his trial.[3] Finding the conviction invalid, the appellate court directed the District Court to grant the petitioner habeas corpus relief. The Court of Appeals noted the District Court's holding that Young had been denied effective assistance of counsel at the sentencing phase of the trial, *id.*, at 795, and its holding that insufficiency of the evidence nullified the jury's finding of aggravating circumstances. *Id.*, at 799, and n. 12. However, the Court of Appeals did not discuss either of these holdings.

In the wake of the federal appellate decision, the State reindicted Young for the same offenses. Moreover, the State again sought the death penalty based upon the same two aggravating circumstances previously charged, along with an additional allegation that the murder was "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga. Code Ann. § 17-10-30(b)(7) (1982).[4]

Young resisted the State's renewed attempt to impose the death penalty upon him, claiming that such an attempt would expose him to double jeopardy in violation of the Fifth and Fourteenth Amendments. The trial court, however, denied his plea of double jeopardy. Young then filed an interlocutory appeal to the Supreme Court of Georgia. That court, with one justice dissenting, affirmed the trial court. 251 Ga. 153, 303 S. E. 2d 431 (1983). The Supreme Court of Georgia ruled that the Double Jeopardy Clause is not implicated by this case because, in its view, the Federal Court of Appeals' decision reversing the District Court vacated not only that part of the District Court's holding which related to Young's conviction, but also that part of the holding which related to the insufficiency of the evidence underlying the jury finding of aggravating circumstances. In the words of the Georgia Supreme Court:

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[3] According to the Court of Appeals, the attorney "did not accord Young even a modicum of professional assistance at any time" during the trial. *Id.*, at 794-795.

[4] The District Court practically invited the State to renew its attempt to seek the death-penalty against Young by suggesting that "the circumstances of this murder may justify a finding of some other aggravating circumstance, such as aggravated battery." 506 F. Supp., at 281. Subsequent to the District Court's suggestion but prior to the State's decision to seek the death penalty at Young's retrial, this Court held in *Bullington* v. *Missouri*, 451 U. S. 430 (1981), that the Double Jeopardy Clause was applicable to capital sentencing hearings like the one to which the petitioner was subjected at his first trial. See *infra*, at 1061-1062.

> "Rather than reversing in part and affirming in part, the court of appeals chose to substitute its opinion for that of the district court. . . . [T]he effect of this reversal was to nullify the entire opinion of the district court and to place the parties in the position *quo ante*, subject, of course, to the holdings of the court of appeals." *Id.*, at 155, 303 S. E. 2d, at 433.

In other words, according to the Supreme Court of Georgia, the Court of Appeals' decision wiped away the District Court's holding that the finding of aggravating circumstances was invalid and thus removed that holding as an impediment to a renewed attempt to impose the death penalty.

This Court should review the decision of the Supreme Court of Georgia because it clearly misread the ruling of the Court of Appeals and thereby improperly avoided the petitioner's compelling double jeopardy claim. Purporting to interpret the Court of Appeals' ruling, the Supreme Court of Georgia concluded that the effect of the reversal by the Court of Appeals of *part* of the District Court's holding regarding federal habeas corpus relief was to nullify the *entire* opinion of the District Court. In reality, however, the Court of Appeals' decision related only to the question whether petitioner received effective assistance of counsel at the guilt-or-innocence phase of his trial.[5] Reversing the District

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[5] The Court of Appeals did not review the District Court's finding of insufficiency of the evidence at the sentencing phase of the trial because, having ruled that Young's conviction was illegal, there was no need to review the propriety of the sentence. The Court of Appeals thus left that aspect of the District Court's ruling undisturbed.

Court, the Court of Appeals held that Young had been denied effective assistance at the guilt-or-innocence phase of the trial. The Court of Appeals said nothing, however, to disturb the District Court's holding that the jury's finding of aggravating circumstances was not reasonably supported by the evidence presented at trial. Indeed, the opinion notes the District Court's conclusion with apparent approval because it cites counsel's obliviousness to the clear insufficiency of the evidence as yet another example of counsel's incompetence. 677 F. 2d, at 799, and n. 12.

The Georgia Supreme Court has committed a glaring error by ignoring the Court of Appeals' express limitation of its ruling to the question whether petitioner had been denied effective assistance of counsel at the guilt-or-innocence phase of his trial. The opinion clearly states that "[t]he district court's denial of the writ of habeas corpus *with respect to the guilt phase of Charlie Young's trial* is therefore REVERSED" (emphasis added). *Id.*, at 800. In light of the Court of Appeals' explicit statement that it reversed only with respect to the guilt phase of petitioner's trial, it is inexplicable how the Supreme Court of Georgia could conclude that the effect of the Court of Appeals' holding was "to nullify the entire opinion of the district court." 251 Ga., at 155, 303 S. E. 2d, at 433.

Given appropriate recognition, the District Court's undisturbed ruling that the jury's finding of aggravating circumstances was not rationally supported by the evidence solidly supports the petitioner's claim that the State should be prevented by the Double Jeopardy Clause from seeking to reimpose a death sentence upon him. This conclusion is dictated by this Court's decisions in *Bullington* v. *Missouri*, 451 U. S. 430 (1981), and *Burks* v. *United States*, 437 U. S. 1 (1978).

In *Bullington*, this Court held that the Double Jeopardy Clause was applicable to the sentencing proceeding in a capital case in Missouri because, under the relevant state law, the sentencing proceeding "was itself a trial on the issue of punishment." 451 U. S., at 438. Describing the trial-like features of the sentencing procedure, the Court observed:

> "The jury [in the sentencing phase of the trial] was not given unbounded discretion to select an appropriate punishment from a wide range authorized by statute. Rather, a separate hearing was required and was held, and the jury was

> presented both a choice between two alternatives and standards to guide the making of that choice. Nor did the prosecution simply recommend what it felt to be an appropriate punishment. It undertook the burden of establishing certain facts beyond a reasonable doubt in its quest to obtain the harsher of the two alternative verdicts." *Ibid.*

These features also characterize the sentencing proceeding under which the petitioner was initially sentenced to death. In Georgia, as in Missouri, an accused may be sentenced to death only after a separate sentencing hearing, governed by the beyond-a-reasonable-doubt standard. Indeed, the Georgia Supreme Court has itself noted that the Missouri death penalty statute "is essentially identical to the Georgia statute." *Godfrey* v. *State*, 248 Ga. 616, 617, 284 S. E. 2d 422, 425 (1981), cert. denied, 456 U. S. 919 (1982). Young, then, like the accused in *Bullington, supra*, was sentenced in a proceeding that was itself a trial on the issue of punishment and thus a proceeding subject to the Double Jeopardy Clause.

In *Burks, supra*, the Court held that an accused may not be subjected to a second trial when conviction in the initial trial is reversed based on insufficiency of evidence. Because the sentencing hearing under Georgia's capital punishment scheme is the equivalent of a trial, at least for the purposes of determining the applicability of the Double Jeopardy Clause, the District Court's holding that the jury's finding of aggravating circumstances is not rationally supported by the evidence should preclude the State from again seeking the death penalty on the basis of those aggravating circumstances.

Moreover, the State should be precluded from seeking the death penalty in this case even though it has alleged a third aggravating circumstance in addition to the two it alleged in the first trial. Having been given one fair chance to prove beyond a reasonable doubt the existence of aggravating circumstances sufficient to justify the execution of Charles Young, Jr., the State should not be allowed a second chance to have him condemned to death. We stated in *Burks, supra*, that "[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." 437 U. S., at 11. Tacking on an additional allegation of an aggravating circumstance is merely a transparent attempt by the State to create a second opportunity to supply evidence which it failed to muster in the first sentencing hearing. Furthermore, in *Bullington, supra,* the Court specifically noted that its decision to prevent a State from seeking the death penalty in a retrial where, in the previous trial, a jury had declined to impose a death sentence did "not at all depend upon the State's announced intention to rely only upon the same aggravating circumstances it sought to prove at [the] first trial or upon its statement that it would introduce no new evidence in support of its contention that [the accused] deserves the death penalty." 451 U. S., at 446.

This Court has indicated in a wide variety of contexts that in matters involving capital punishment, a heightened degree of judicial scrutiny is warranted, given the special nature of the interest at stake: the very life of the accused. Here, however, the Court is willing to allow the State of Georgia to seek anew to impose the death penalty upon Charlie Young, Jr., even though it is almost certainly the case that absent the Georgia Supreme Court's egregious misreading of the United States Court of Appeals' decision in *Young* v. *Zant, supra,* the State would be barred from again seeking the death penalty. I therefore dissent from the Court's denial of a writ of certiorari.

No. 83–5659. CHILDRESS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 715 F. 2d 1313.

No. 83–5670. LEVASSEUR *v.* VIRGINIA. Sup. Ct. Va.;

No. 83–5695. DOBARD *v.* ALABAMA. Sup. Ct. Ala.;

No. 83–5701. ADAMS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.; and

No. 83–5705. COE *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: No. 83–5670, 225 Va. 564, 304 S. E. 2d 644; No. 83–5695, 435 So. 2d 1351; No. 83–5701, 709 F. 2d 1443; No. 83–5705, 655 S. W. 2d 903.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia,* 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 82-1868. ARNOLD TRANSIT CO., INC., ET AL. *v.* CITY OF MACKINAC ISLAND, *ante*, p. 804;

No. 82-1971. SCHAEFER *v.* NATIONAL LABOR RELATIONS BOARD, *ante*, p. 945;

No. 82-2057. LESIAK *v.* FERGUSON, AUDITOR OF THE STATE OF OHIO, *ante*, p. 826;

No. 82-6744. PRASAD *v.* WASSAIC DEVELOPMENTAL CENTER ET AL., *ante*, p. 834;

No. 82-6768. FINNEY *v.* MICHIGAN DEPARTMENT OF SOCIAL SERVICES, *ante*, p. 923;

No. 82-6922. DE LA ROSA *v.* TEXAS, *ante*, p. 865;

No. 82-6997. HINES *v.* UNITED STATES, *ante*, p. 972;

No. 83-180. SOUTHERN PACIFIC TRANSPORTATION CO. *v.* SECRETARY OF THE INTERIOR ET AL., *ante*, p. 960;

No. 83-279. PIUS XII ACADEMY, INC. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 982;

No. 83-296. LEBOVITZ *v.* UNITED STATES, *ante*, p. 992;

No. 83-314. OSTRIC *v.* CORPORATION OF ST. MARY'S COLLEGE, NOTRE DAME, ET AL., *ante*, p. 936;

No. 83-428. BARWICK *v.* SOUTH CAROLINA, *ante*, p. 938;

No. 83-5064. EWING ET AL. *v.* UNITED STATES, *ante*, p. 997;

No. 83-5200. WHAM *v.* UNITED STATES POSTAL SERVICE, *ante*, p. 860;

No. 83-5274. FITZPATRICK *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, *ante*, p. 963;

No. 83-5291. NOE *v.* TEXAS, *ante*, p. 997;

No. 83-5334. ATTWELL *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, *ante*, p. 941;

No. 83-5339. DICK *v.* KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER, *ante*, p. 986;

No. 83-5354. AMADEO *v.* KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER, *ante*, p. 956;

No. 83-5389. MINCEY *v.* GEORGIA, *ante*, p. 977;

No. 83-5406. BUNCH *v.* VIRGINIA, *ante*, p. 977;

No. 83-5430. LAMORE *v.* INLAND DIVISION OF GENERAL MOTORS CORP. ET AL., *ante*, p. 963;

No. 83-5491. BROWN *v.* DOUGLAS, JUDGE, *ante*, p. 985; and

No. 83-5644. ANTONE *v.* STRICKLAND, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL., *ante*, p. 1003. Petitions for rehearing denied.

JANUARY 11, 1984

Certiorari Granted. (See No. 81–2159, *ante*, at 248.)

Certiorari Denied

No. 83–6017 (A–533). HUTCHINS *v.* GARRISON, WARDEN, ET AL. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. Reported below: 724 F. 2d 1425.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution, grant certiorari, and vacate the death sentence in this case.

JANUARY 12, 1984

Dismissal Under Rule 53

No. A–457. RAJNEESH ET AL. *v.* MCGREER. D. C. Ore. Application for stay dismissed under this Court's Rule 53.

JANUARY 16, 1984

Appeal Dismissed

No. 82–1899. TRANS WORLD AIRLINES, INC. *v.* NEW YORK STATE HUMAN RIGHTS APPEAL BOARD ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 58 N. Y. 2d 778, 445 N. E. 2d 220.

Miscellaneous Orders

No. A–470. CLARK, SECRETARY OF THE INTERIOR, ET AL. *v.* CALIFORNIA ET AL.; and

No. A–471. WESTERN OIL & GAS ASSN. ET AL. *v.* CALIFORNIA ET AL. D. C. C. D. Cal. Motion to vacate the stay heretofore entered by JUSTICE REHNQUIST on December 20, 1983 [*post*, p. 1304], denied.

No. A–491. CONSUMER VALUE STORES *v.* BOARD OF PHARMACY OF NEW JERSEY. Super. Ct. N. J., App. Div. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A–498. EDMOND ET AL. *v.* NELSON, COMMISSIONER, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, ET AL. Application for stay of deportation, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–519. SOUTHEAST VOLUSIA HOSPITAL DISTRICT ET AL. *v.* FLORIDA PATIENT'S COMPENSATION FUND ET AL. Sup. Ct. Fla. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. D–367. IN RE DISBARMENT OF TREUBER. Disbarment entered. [For earlier order herein, see *ante*, p. 911.]

No. D–372. IN RE DISBARMENT OF CHAGRA. Disbarment entered. [For earlier order herein, see *ante*, p. 912.]

No. D–375. IN RE DISBARMENT OF ITALIANO. Disbarment entered. [For earlier order herein, see *ante*, p. 926.]

No. D–380. IN RE DISBARMENT OF DESMOND. Disbarment entered. [For earlier order herein, see *ante*, p. 927.]

No. D–391. IN RE DISBARMENT OF DROBNY. It is ordered that Irving M. Drobny, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–392. IN RE DISBARMENT OF SINEMA. It is ordered that Dan Alan Sinema, of Tucson, Ariz., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–393. IN RE DISBARMENT OF MOUSHEY. It is ordered that Charles L. Moushey, of Alliance, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–394. IN RE DISBARMENT OF SCHLESINGER. It is ordered that Arnold Schlesinger, of Beverly Hills, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-395. IN RE DISBARMENT OF SHAPIRO. It is ordered that Stanley Charles Shapiro, of Los Angeles, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 82-2056. ESCONDIDO MUTUAL WATER CO. ET AL. *v.* LA JOLLA BAND OF MISSION INDIANS ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 913.] Motion of the Solicitor General to permit divided argument on behalf of petitioners and on behalf of respondents granted.

No. 83-185. COOPER ET AL. *v.* FEDERAL RESERVE BANK OF RICHMOND. C. A. 4th Cir. [Certiorari granted, *ante*, p. 932.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 83-620. UNITED STATES *v.* RODGERS. C. A. 8th Cir. [Certiorari granted, *ante*, p. 1007.] Motion for appointment of counsel granted, and it is ordered that Albert N. Moskowitz, Esquire, of Kansas City, Mo., be appointed to serve as counsel for respondent in this case.

No. 83-802. BURLINGTON NORTHERN RAILROAD CO. ET AL. *v.* LENNEN, SECRETARY OF REVENUE OF KANSAS, ET AL. C. A. 10th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. JUSTICE O'CONNOR took no part in the consideration or decision of this order.

No. 83-851. SOUTH STREET SEAPORT MUSEUM, AS OWNER OF THE BARK PEKING *v.* MCCARTHY ET AL. C. A. 2d Cir. Motion of National Maritime Historical Society et al. for leave to file a brief as *amici curiae* granted.

No. 83-5778. ORDWAY *v.* REGION 13 MENTAL HEALTH-MENTAL RETARDATION COMMISSION, DBA GULF COAST MENTAL HEALTH CENTER, ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until February 6, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, *ante*, p. 928, we would deny the petition for certiorari in this case without reaching the merits of the motion to proceed *in forma pauperis.*

No. 83–5796. Crowe *v.* Georgia. Sup. Ct. Ga. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until February 6, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

Justice Brennan, Justice Marshall, and Justice Stevens, dissenting.

For the reasons expressed in *Brown* v. *Herald Co., ante,* p. 928, we would deny the petition for certiorari in this case without reaching the merits of the motion to proceed *in forma pauperis.*

No. 83–5755. In re Tarkowski. Petition for writ of mandamus denied.

Certiorari Granted

No. 83–747. Washington Metropolitan Area Transit Authority *v.* Johnson et al. C. A. D. C. Cir. Certiorari granted. Reported below: 230 U. S. App. D. C. 297, 717 F. 2d 574.

No. 83–838. United States *v.* Lorenzetti. C. A. 3d Cir. Certiorari granted. Reported below: 710 F. 2d 982.

No. 83–850. United States *v.* Karo et al. C. A. 10th Cir. Certiorari granted. Reported below: 710 F. 2d 1433.

Certiorari Denied

No. 82–1938. California et al. *v.* Standard Oil Company of California et al. C. A. 9th Cir. Certiorari denied. Reported below: 691 F. 2d 1335.

No. 82–6765. Unterthiner *v.* Desert Hospital District of Palm Springs. Sup. Ct. Cal. Certiorari denied. Reported below: 33 Cal. 3d 285, 656 P. 2d 554.

No. 83–414. Griggs *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 706 F. 2d 316.

No. 83–432. GULLETT *v.* UNITED STATES; and
No. 83–616. FOX *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 713 F. 2d 1203.

No. 83–435. WICHITA BOARD OF TRADE ET AL. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 706 F. 2d 1067.

No. 83–475. STAHL ET AL. *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 665 P. 2d 839.

No. 83–527. INTERNATIONAL MOORING & MARINE, INC., ET AL. *v.* BERTRAND ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 700 F. 2d 240.

No. 83–575. OLIVER ET AL. *v.* MCCLURE, PROSECUTOR OF BERGEN COUNTY, NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 83–581. HAIMOWITZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 706 F. 2d 1549 and 712 F. 2d 457.

No. 83–605. MILLS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 713 F. 2d 1249.

No. 83–644. HATCH ET AL. *v.* RELIANCE INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied.

No. 83–697. BUILDING & CONSTRUCTION TRADES DEPARTMENT, AFL–CIO, ET AL. *v.* DONOVAN, SECRETARY OF LABOR, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 229 U. S. App. D. C. 297, 712 F. 2d 611.

No. 83–717. MORROW ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 717 F. 2d 800.

No. 83–755. LEDESMA *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 251 Ga. 487, 306 S. E. 2d 629.

No. 83–798. QUINTANILLA *v.* SCIENTIFIC-ATLANTA, INC. C. A. 5th Cir. Certiorari denied.

No. 83–799. LEWIS *v.* BROWN & ROOT, INC. C. A. 5th Cir. Certiorari denied. Reported below: 711 F. 2d 1287.

No. 83–801. PICKANDS MATHER & CO., AS MANAGING AGENT FOR ERIE MINING CO. *v.* COMMISSIONER OF REVENUE OF MINNE-

SOTA ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 334 N. W. 2d 155.

No. 83-803. SCHULTZ *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 437 So. 2d 670.

No. 83-805. WILLIAMS *v.* TEXAS DEPARTMENT OF HUMAN RESOURCES ET AL. Ct. App. Tex., 2d Sup. Jud. Dist. Certiorari denied.

No. 83-814. BERRY & GORE, LTD. *v.* ADMINISTRATOR, ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION. Sup. Ct. Ill. Certiorari denied.

No. 83-819. METZ *v.* TOOTSIE ROLL INDUSTRIES, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 715 F. 2d 299.

No. 83-821. WHITE HYDRAULICS, INC., ET AL. *v.* SAUER-GETRIEBE, KG. C. A. 7th Cir. Certiorari denied. Reported below: 715 F. 2d 348.

No. 83-822. WILLIAMS *v.* WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY. C. A. D. C. Cir. Certiorari denied. Reported below: 230 U. S. App. D. C. 297, 717 F. 2d 574.

No. 83-823. CLACKAMAS COUNTY HOUSING AUTHORITY ET AL. *v.* TELFORD. C. A. 9th Cir. Certiorari denied. Reported below: 710 F. 2d 567.

No. 83-827. KAPOCSI *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 668 P. 2d 1157.

No. 83-839. HAWTHORNE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 720 F. 2d 684.

No. 83-842. RUSSELL *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 436 So. 2d 1016.

No. 83-843. RIFE *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 215 Neb. 132, 337 N. W. 2d 724.

No. 83-847. KOURAKOS *v.* TULLY ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 92 App. Div. 2d 1051, 461 N. Y. S. 2d 540.

No. 83-852. BELL *v.* SELLEVOLD ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 713 F. 2d 1396.

No. 83-856. DORIA MINING & ENGINEERING CORP. *v.* CLARK, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 718 F. 2d 1109.

No. 83-920. GAMBALE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1443.

No. 83-925. CARRICO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 714 F. 2d 154.

No. 83-939. REDMOND *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 83-940. BEHRING INTERNATIONAL, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 714 F. 2d 291.

No. 83-5402. GAERTNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 705 F. 2d 210.

No. 83-5484. CAVAZOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 708 F. 2d 719.

No. 83-5488. ARMSTRONG *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 83-5505. YOUNG-BUFFALO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 705 F. 2d 468.

No. 83-5537. HAGGINS *v.* WARDEN, FORT PILLOW STATE FARM. C. A. 6th Cir. Certiorari denied. Reported below: 715 F. 2d 1050.

No. 83-5541. MISHMASH ET AL. *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 423 So. 2d 446.

No. 83-5575. PRICE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 716 F. 2d 899.

No. 83-5581. GLOVER ET AL. *v.* ALEXANDER, SECRETARY OF THE ARMY. C. A. 4th Cir. Certiorari denied. Reported below: 714 F. 2d 129.

No. 83-5621. STRONG *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 712 F. 2d 1414.

No. 83-5663. WEBB *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 708 F. 2d 444.

No. 83-5749. Yu *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 143 Cal. App. 3d 358, 191 Cal. Rptr. 859.

No. 83-5751. Pipinos *v.* California. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 83-5770. Antonelli *v.* Field Enterprises, Inc. Sup. Ct. Ill. Certiorari denied.

No. 83-5771. Royse *v.* Corhart Refractories Co. C. A. 6th Cir. Certiorari denied. Reported below: 720 F. 2d 679.

No. 83-5774. Alford *v.* Allsbrook et al. C. A. 4th Cir. Certiorari denied. Reported below: 714 F. 2d 127.

No. 83-5782. Rose *v.* Maryland. Ct. Sp. App. Md. Certiorari denied. Reported below: 54 Md. App. 747.

No. 83-5783. Simpson *v.* Isringhausen. C. A. 8th Cir. Certiorari denied. Reported below: 718 F. 2d 1106.

No. 83-5784. Mally *v.* Shimer. C. A. 2d Cir. Certiorari denied. Reported below: 722 F. 2d 728.

No. 83-5787. Dixon *v.* Missouri. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 655 S. W. 2d 547.

No. 83-5788. Williams *v.* DeRobertis, Warden, et al. C. A. 7th Cir. Certiorari denied. Reported below: 715 F. 2d 1174.

No. 83-5789. Shaffer-Corona *v.* Smith. Ct. App. D. C. Certiorari denied.

No. 83-5791. Partlow *v.* Indiana. Sup. Ct. Ind. Certiorari denied. Reported below: 453 N. E. 2d 259.

No. 83-5793. Howell *v.* Appling. C. A. 4th Cir. Certiorari denied. Reported below: 722 F. 2d 738.

No. 83-5797. Malumphy *v.* Arizona Board of Pardons and Parole et al. C. A. 9th Cir. Certiorari denied. Reported below: 711 F. 2d 1064.

No. 83-5804. Nerison *v.* Solem, Warden, et al. C. A. 8th Cir. Certiorari denied. Reported below: 715 F. 2d 415.

No. 83-5827. Brooks *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 718 F. 2d 1093.

No. 83–5845. Kimble et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 719 F. 2d 1253.

No. 83–5853. Miller *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 720 F. 2d 227.

No. 83–5876. Ochs *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1444.

No. 82–2128. American Telephone & Telegraph Co. et al. *v.* Litton Systems, Inc., et al. C. A. 2d Cir. Motion of National Association of Regulatory Utility Commissioners for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 700 F. 2d 785.

No. 83–332. County of Los Angeles *v.* Equal Employment Opportunity Commission. C. A. 9th Cir. Certiorari denied. Justice O'Connor would grant certiorari. Reported below: 706 F. 2d 1039.

No. 83–512. Sutton et al. *v.* Bloom. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 710 F. 2d 1188.

No. 83–808. Maryland *v.* Foster. Ct. App. Md. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 297 Md. 191, 464 A. 2d 986.

No. 83–837. Arizona *v.* Routhier. Sup. Ct. Ariz. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 137 Ariz. 90, 669 P. 2d 68.

No. 83–854. Nourse, Circuit Judge of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida *v.* Florida Department of Health and Rehabilitative Services et al. Sup. Ct. Fla. Motion of Office of the Public Defender for leave to file a brief as *amicus curiae* granted. Petition for writ of certiorari and/or prohibition denied. Reported below: 441 So. 2d 632.

No. 83–5387. Mitchell *v.* Texas. Ct. Crim. App. Tex.;
No. 83–5737. Cooper *v.* Florida. Sup. Ct. Fla.; and
No. 83–5776. Coleman *v.* Oklahoma. Ct. Crim. App. Okla.
Certiorari denied. Reported below: No. 83–5387, 650 S. W. 2d 801; No. 83–5737, 437 So. 2d 1070; No. 83–5776, 668 P. 2d 1126.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth

and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 83-5768. DAVIS *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 114 Ill. App. 3d 1160, 459 N. E. 2d 703.

No. 83-5891. CLAXTON *v.* COPELAND, WARDEN. Sup. Ct. Ariz. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

Rehearing Denied

No. 83-3. BAGINSKY *v.* UNITED STATES, *ante*, p. 981;
No. 83-635. VEENKANT *v.* COOK ET AL., *ante*, p. 1009;
No. 83-5415. THOMAS *v.* UNITED STATES, *ante*, p. 998;
No. 83-5542. IN RE GILL, *ante*, p. 990; and
No. 83-5618. FORSYTH *v.* UNITED STATES, *ante*, p. 1001. Petitions for rehearing denied.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Justice Stewart (retired) to perform judicial duties in the United States Court of Appeals for the Third Circuit beginning June 14, 1984, and ending June 15, 1984, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294(a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 1074 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

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OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

AUTRY *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS

ON APPLICATION FOR STAY

No. A–242. Decided October 5, 1983

An application to stay applicant's execution under a sentence imposed by the courts of Texas is granted pending the final disposition by the United States Court of Appeals for the Fifth Circuit of applicant's appeal from the District Court's denial of a writ of habeas corpus, or until a further order by this Court or by the Circuit Justice. One of the grounds on which applicant sought relief, not raised in his earlier habeas corpus petition, was the Texas Court of Criminal Appeals' failure to determine whether his death sentence is disproportionate to the punishment imposed on others. The issue of whether the Federal Court of Appeals properly concluded that the Texas death-penalty system, as a whole, satisfies any constitutional requirement with respect to proportionality cannot be said to lack substance, since this Court has granted certiorari in another case to review a holding of the Court of Appeals for the Ninth Circuit that a California death sentence cannot be carried out until the State Supreme Court conducts a comparative proportionality review.

Justice White, Circuit Justice.

Applicant is under a sentence of death imposed by the courts of Texas. His execution is scheduled to be carried out after midnight of October 4, c. d. t. He has once unsuccessfully sought a writ of habeas corpus from the United States District Court; denial of the writ was affirmed by the Court of Appeals for the Fifth Circuit, 706 F. 2d 1394 (1983), and on October 3, 1983, we denied a stay pending the filing of a petition for certiorari. *Ante*, p. 1. Applicant then filed a second petition for habeas corpus, raising grounds not presented in his first petition and hence not before us when we so recently denied a stay of execution. After a hearing, the District Court denied both the writ and a certificate of probable cause, which, under 28 U. S. C. § 2253, is a prerequisite to an appeal. The Court of Appeals then held a hearing, denied the certificate of probable cause, and denied the stay. Applicant has now applied to me for a stay.

One of the three grounds on which applicant sought relief in his second habeas corpus petition is the failure of the Texas Court of Criminal Appeals to compare his case with other cases in order to determine whether his death sentence is disproportionate to the punishment imposed on others. That ground as I have said was not presented in his first petition. Although it appears that no such review was in fact carried out in this case, the Court of Appeals held that the Texas death-penalty system, as a whole, satisfies any constitutional requirement with respect to proportionality.

I am compelled to issue a certificate of probable cause to appeal, as I am authorized to do under § 2253, and to enter a stay pending the final disposition of the appeal by the Court of Appeals. On March 21, we granted certiorari in No. 82–1095, *Pulley* v. *Harris*. 460 U. S. 1036. In that case, the Court of Appeals for the Ninth Circuit held that a death sentence cannot be carried out by the State of California until and unless the State Supreme Court conducts a comparative proportionality review, which, the court held, was constitutionally required. 692 F. 2d 1189 (1982). We shall hear argument in that case in November, and if we affirm the Court of Appeals for the Ninth Circuit, there will be a substantial question whether the views of the Court of Appeals for the Fifth Circuit with respect to the proportionality issue were correct. Of course I do not know how the Court will rule on this question, but in view of the judgment of the Court of Appeals for the Ninth Circuit and in view of our decision to give the case plenary consideration, I cannot say that the issue lacks substance. Accordingly, I hereby issue a certificate of probable cause and stay petitioner's execution pending the final disposition of the appeal by the Court of Appeals, or until the Court's or my further order.

In my view, it would be desirable to require by statute that all federal grounds for challenging a conviction or a sentence be presented in the first petition for habeas corpus. Except in unusual circumstances, successive writs would be summarily denied. But historically, res judicata has been inapplicable to habeas corpus proceedings, *Sanders* v. *United States*, 373 U. S. 1, 7–8 (1963), and 28 U. S. C. § 2244(a) and 28 U. S. C. § 2254 Rule 9 implicitly recognize the legitimacy of successive petitions raising grounds that have not previously been presented and adjudicated.

CLARK, SECRETARY OF INTERIOR, ET AL. *v.* CALIFORNIA ET AL.

ON APPLICATION FOR STAY

No. A–470. Decided December 20, 1983*

Applications to stay the District Court's preliminary injunction prohibiting the Secretary of the Interior from conducting a sale of certain tracts on the Pacific Outer Continental Shelf for oil and gas leasing are granted pending this Court's resolution in another case of a controlling question involving the proper construction of § 307(c)(1) of the Coastal Zone Management Act of 1972.

JUSTICE REHNQUIST, Circuit Justice.

Applicants, who include the Secretary of the Interior and the Western Oil and Gas Association, request that I stay a preliminary injunction issued by the United States District Court for the Central District of California. The United States Court of Appeals for the Ninth Circuit denied the request for a stay without opinion. The preliminary injunction prohibits the Secretary from conducting Lease Sale 73, the sale of 137 designated tracts on the Pacific Outer Continental Shelf for oil and gas leasing. As issued it is effective pending final determination of respondent California's claims, the principal of which is its claim that the Secretary did not prepare an adequate "consistency determination" pursuant to § 307(c)(1) of the Coastal Zone Management Act of 1972, 86 Stat. 1285, 16 U. S. C. § 1456(c)(1), as interpreted by the Court of Appeals for the Ninth Circuit in *California* v. *Watt*, 683 F. 2d 1253 (1982), cert. granted, 461 U. S. 925 (1983) (argued November 1, 1983).

Section 307(c)(1) provides:

> "Each Federal agency conducting or supporting activities *directly affecting* the coastal zone shall conduct or

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*Together with No. A–471, *Western Oil & Gas Association et al.* v. *California et al.*, also on application for stay of the same preliminary injunction.

> support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs." 16 U. S. C. § 1456(c)(1) (emphasis added).

In *California* v. *Watt, supra* (now *sub nom. Clark* v. *California*), the Court will decide whether the Secretary's sale of oil and gas leases is an activity "directly affecting" the coastal zone within the meaning of § 307(c)(1). Unless the Court answers that question in the affirmative, there is no statutory requirement at this stage of the project that the Secretary prepare the "consistency determination" which the District Court deemed inadequate and which formed the basis of its decision to issue the injunction in this case.

Having examined the submissions of the parties, I have decided to stay the preliminary injunction pending this Court's resolution of the question presented in *Clark* v. *California*, concluding as I do that in the interim the traditional considerations affecting the award of equitable relief favor the applicants.

It is so ordered.

McDONALD *v.* MISSOURI

ON APPLICATION FOR STAY

No. A–525. Decided January 3, 1984*

Applications to stay the executions of the four applicants, each convicted in a Missouri state court of capital murder, are granted, where the Missouri Supreme Court, after affirming each conviction and sentence on direct appeal, set the execution in each case on a date within the period for petitioning this Court for a writ of certiorari for direct review of the conviction and sentence.

JUSTICE BLACKMUN, Circuit Justice.

I have before me applications to stay the executions of Samuel Lee McDonald, Leonard Marvin Laws, Thomas Henry Battle, and George Clifton Gilmore; each convicted in a Missouri state court of capital murder and each sentenced to die on January 6, 1984. Their respective convictions and sentences have been affirmed by the Supreme Court of Missouri on direct appeal, *State* v. *McDonald*, 661 S. W. 2d 497 (1983); *State* v. *Laws* 661 S. W. 2d 526 (1983); *State* v. *Battle*, 661 S. W. 2d 487 (1983); *State* v. *Gilmore*, 650 S. W. 2d 627 (1983), but review here on such federal grounds as the respective applicants may possess has not yet been had. The execution date in each case has been fixed by the Missouri Supreme Court. See Mo. Rule Crim. Proc. 29.08(d).

In *Williams* v. *Missouri*, 463 U. S. 1301 (1983), I granted a stay of execution pending timely filing and disposition of a petition for certiorari on direct review. That case procedurally was similar to these, and the Supreme Court of Missouri there, also, had denied a stay of its mandate. In a short accompanying opinion, I pointed out that, if a federal question is involved, the process of direct review "'includes the right

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*Together with No. A–526, *Laws* v. *Missouri;* No. A–527, *Battle* v. *Missouri;* and No. A–531, *Gilmore* v. *Missouri*, also on applications for stays of executions.

to petition this Court for a writ of certiorari,'" *ibid.*, quoting *Barefoot* v. *Estelle,* 463 U. S. 880, 887 (1983). I specifically stated:

> "[I]f a State schedules an execution to take place before filing and disposition of a petition for certiorari, I must stay that execution pending completion of direct review, as a matter of course." 463 U. S., at 1302.

Every defendant in a state court of this Nation who has a right of direct review from a sentence of death, no matter how heinous his offense may appear to be, is entitled to have that review before paying the ultimate penalty. The right of review otherwise is rendered utterly meaningless. It makes no sense to have the execution set on a date within the time specified for that review, see 28 U. S. C. §§ 1257 and 2101; this Court's Rule 20.1, and before the review is completed. I thought I had advised the Supreme Court of Missouri once before, in *Williams*, that, as Circuit Justice of the Circuit in which the State of Missouri is located, I, upon proper application, shall stay the execution of any Missouri applicant whose direct review of his conviction and death sentence is being sought and has not been completed. I repeat the admonition to the Supreme Court of Missouri, and to any official within the State's chain of responsibility, that I shall continue that practice. The stay, of course, ought to be granted by the state tribunal in the first instance, but, if it fails to fulfill its responsibility, I shall fulfill mine.

Accordingly, in each of the four cases, I grant the application to stay the execution now scheduled for January 6, 1984. Orders are being entered accordingly.

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INDEX

ACCESS OF PUBLIC AND PRESS TO VOIR DIRE EXAMINATION OF JURORS. See **Constitutional Law, I.**

ADMINISTRATIVE SUBPOENAS DUCES TECUM. See **Constitutional Law, II, 2.**

ADVISERS OF INVESTMENT COMPANIES. See **Investment Company Act of 1940.**

AGGRAVATING CIRCUMSTANCES WARRANTING DEATH SENTENCE. See **Habeas Corpus, 2.**

AIRLINES. See **Airport Development Acceleration Act of 1973.**

AIRPORT DEVELOPMENT ACCELERATION ACT OF 1973.

Airlines' gross income—Pre-emption of state tax.—Section 7(a) of Act, which proscribes state taxes on gross receipts derived from sale of air transportation, pre-empts Hawaii tax on annual gross income of airlines operating within State, even though state statute declared tax to be one on airlines' personal property, which would be permissible under § 7(a). Aloha Airlines, Inc. v. Director of Taxation, p. 7.

ALIENS. See **Collateral Estoppel, 2; Immigration and Nationality Act.**

AMENDED TAX RETURNS. See **Internal Revenue Code, 1.**

ARSON. See **Constitutional Law, II, 1; Criminal Law.**

ATOMIC ENERGY ACT OF 1954.

Injuries from nuclear contamination—Punitive damages—Pre-emption of state law.—An award of punitive damages in an action to recover under Oklahoma common-law tort principles for contamination injuries suffered by appellant's decedent while employed in a federally licensed nuclear plant operated by one of appellees was not pre-empted by federal law, particularly Atomic Energy Act or Price-Anderson Act. Silkwood v. Kerr-McGee Corp., p. 238.

CAPITAL PUNISHMENT. See **Habeas Corpus, 2; Stays, 1–6.**

CASE OR CONTROVERSY. See **Jurisdiction.**

CHARACTER EVIDENCE INSTRUCTIONS. See **Procedure.**

CIVIL SERVICE REFORM ACT OF 1978.

Collective bargaining with agency—Employee union representative—Right to per diem and travel expenses.—Interpretation of § 7131(a) of Act by Federal Labor Relations Authority—so as to require federal agencies to pay per diem and travel expenses (in addition to salary) of a Government employee representing union in collective bargaining with agency—was improper. Bureau of Alcohol, Tobacco and Firearms v. FLRA, p. 89.

CLEAN AIR ACT. See **Collateral Estoppel,** 1.

COASTAL ZONE MANAGEMENT ACT. See also **Stays,** 7.

Sale of Outer Continental Shelf oil and gas leases—Activity "directly affecting" coastal zone.—Department of Interior's sale of oil and gas leases located on Outer Continental Shelf beyond States' coastal zones is not an activity "directly affecting the coastal zone" within meaning of § 307(c)(1) of Act, and thus a review by Department to determine whether proposed sale of leases would be consistent with state programs for management of coastal zone was not required. Secretary of Interior v. California, p. 312.

COLLATERAL ESTOPPEL.

1. *Construction of Clean Air Act—Estoppel against Government.*—Doctrine of mutual defensive collateral estoppel is applicable against United States to preclude relitigation of same issue already litigated against same party in another case involving virtually identical facts; thus Government was collaterally estopped from asserting that private contractors were "authorized representatives" under Clean Air Act for purposes of inspecting respondent company's premises because of contrary decision in another case involving same parties. United States v. Stauffer Chemical Co., p. 165.

2. *Naturalization of aliens—Constitutional issue—Estoppel against Government.*—United States may not be collaterally estopped on an issue adjudicated against it in an earlier lawsuit brought by a different party; thus Government was not collaterally estopped from litigating respondent Filipino national's claim in naturalization proceedings that he had been denied due process by Government's administration of Nationality Act of 1940 with regard to naturalization of noncitizens who had served in Armed Forces during World War II, on basis of an earlier unappealed District Court decision against Government in suit brought by other Filipino nationals. United States v. Mendoza, p. 154.

COLLECTIVE BARGAINING WITH GOVERNMENT AGENCY. See **Civil Service Reform Act of 1978.**

COMMUNICATIONS BETWEEN JUDGE AND JUROR. See **Habeas Corpus,** 1.

CONSTITUTIONAL LAW. See also **Collateral Estoppel, 2; Habeas Corpus; Stays, 2.**

I. Right of Access to Criminal Trials.

Voir dire examination of jurors—Public proceedings.—Constitutional guarantees as to fair trial and open public proceedings in criminal trial cover proceedings for *voir dire* examination of potential jurors, and presumption of openness was not rebutted in instant case where state trial court denied petitioner's motion that *voir dire* in prosecution for rape and murder be open to public and press. Press-Enterprise Co. v. Superior Court of Cal., p. 501.

II. Searches and Seizures.

1. *Fire at residence—Search by arson investigators.*—Where (1) five hours after firefighters extinguished fire at respondents' home and left premises, arson investigators entered house without respondents' consent or a search warrant, (2) search of basement produced evidence that fire had been set deliberately, (3) search of upper portions of house revealed additional evidence of arson, and (4) motion to suppress evidence was denied by state court prior to respondents' trial on arson charges, Michigan Court of Appeals' judgment reversing trial court's judgment was, in turn, reversed insofar as it excluded fuel can found in plain view by firefighters, but was affirmed insofar as it excluded rest of evidence as product of unconstitutional postfire search of premises. Michigan v. Clifford, p. 287.

2. *Subpoena duces tecum—Labor Department investigation.*—Where a Labor Department official, acting pursuant to authority under Fair Labor Standards Act to subpoena witnesses and documentary evidence relating to investigations of an employer's compliance with Act, entered appellee motel and restaurant and served an administrative subpoena *duces tecum* on one of appellee's employees, subpoena did not violate Fourth Amendment. Donovan v. Lone Steer, Inc., p. 408.

"CONTINUOUS PHYSICAL PRESENCE" OF ALIEN. See **Immigration and Nationality Act.**

COPYRIGHTS.

Contributory infringement—Marketing of video tape recorders. Petitioners' marketing of video tape recorders to general public does not constitute contributory infringement of respondents' copyrighted works broadcast on public airwaves. Sony Corp. v. Universal City Studios, Inc., p. 417.

CORPORATE SHAREHOLDERS' SUITS. See **Investment Company Act of 1940.**

COURTS OF APPEALS. See **Jurisdiction.**

CRIMINAL LAW. See also **Constitutional Law, I; II, 1; Habeas Corpus; Procedure; Stays, 1–6.**

Racketeering—Arson ring—Forfeiture of insurance proceeds.—Insurance proceeds received by petitioner, whose involvement in an arson ring resulted in his conviction under federal statutes relating to racketeering, constituted an illegally acquired "interest" within meaning of 18 U. S. C. § 1963(a)(1) and were therefore subject to forfeiture. Russello v. United States, p. 16.

DAMAGES. See **Atomic Energy Act of 1954.**

DEATH PENALTY. See **Habeas Corpus, 2; Stays, 1–6.**

DEPORTATION. See **Immigration and Nationality Act.**

DERIVATIVE ACTIONS BY CORPORATE SHAREHOLDERS. See **Investment Company Act of 1940.**

DISCRIMINATION BASED ON SEX. See **Jurisdiction.**

"DISPLACED PERSON." See **Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.**

DUE PROCESS. See **Collateral Estoppel, 2.**

EIGHTH AMENDMENT. See **Habeas Corpus, 2.**

EMPLOYER AND EMPLOYEES. See **Civil Service Reform Act of 1978.**

ESTOPPEL. See **Collateral Estoppel.**

FAIR LABOR STANDARDS ACT. See **Constitutional Law, II, 2.**

"FAIR USE" OF COPYRIGHTED MATERIALS. See **Copyrights.**

FALSE TAX RETURNS. See **Internal Revenue Code, 1.**

FEDERAL-AID HIGHWAY ACT OF 1968. See **Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.**

FEDERAL INCOME TAXES. See **Internal Revenue Code.**

FEDERAL LABOR RELATIONS AUTHORITY. See **Civil Service Reform Act of 1978.**

FEDERAL RULES OF CIVIL PROCEDURE. See **Investment Company Act of 1940; Jurors.**

FEDERAL-STATE RELATIONS. See **Airport Development Acceleration Act of 1973; Atomic Energy Act of 1954; Coastal Zone Management Act; Habeas Corpus, 2; Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.**

"FIRE" SEARCHES. See **Constitutional Law, II, 1.**

FIRST AMENDMENT. See **Constitutional Law, I.**

FLORIDA. See **Habeas Corpus, 2.**

FORFEITURES. See **Criminal Law.**

FOURTEENTH AMENDMENT. See **Constitutional Law, II, 1.**

FOURTH AMENDMENT. See **Constitutional Law, II.**

FRAUDULENT TAX RETURNS. See **Internal Revenue Code, 1.**

GAS DEPLETION ALLOWANCE. See **Internal Revenue Code, 2.**

GAS LEASES. See **Coastal Zone Management Act; Internal Revenue Code, 2; Stays, 7.**

GOVERNMENT EMPLOYEES. See **Civil Service Reform Act of 1978.**

HABEAS CORPUS. See also **Stays, 3, 4.**

1. *Communications between juror and judge—Harmless error—State-court findings.*—Lower federal courts erred in granting habeas corpus relief to respondent state prisoner on ground that unrecorded *ex parte* communications between a trial judge and a juror could never be harmless error, and under 28 U. S. C. § 2254(d) should have deferred to presumptively correct state-court finding that alleged constitutional violations were harmless error. Rushen v. Spain, p. 114.

2. *State-court death penalty—Federal habeas corpus proceedings.*—Where (1) Florida Supreme Court held that state-court trial judge had not considered nonstatutory aggravating circumstance of future dangerousness in sentencing respondent to death after conviction for murder, and (2) Federal District Court, denying habeas corpus relief, held that record did not support claim that trial judge had improperly considered such aggravating circumstance, Court of Appeals erred in concluding that record did not support Florida Supreme Court's finding, and in reversing District Court, since it did not appear that, even if sentencing judge considered improper factor, balancing process of comparing aggravating and mitigating circumstances, as prescribed by Florida statute, was so infected as to render death sentence constitutionally impermissible. Wainwright v. Goode, p. 78.

HAWAII. See **Airport Development Acceleration Act of 1973.**

HONORARY SOCIETIES' MEMBERSHIP POLICIES. See **Jurisdiction.**

HOUSE SEARCHES BY ARSON INVESTIGATORS. See **Constitutional Law, II, 1.**

IMMIGRATION AND NATIONALITY ACT.

Suspension of deportation—"Continuous physical presence" requirement.—Where respondent illegal alien had left United States for three months and had then improperly reentered country, she did not meet 7-year "continuous physical presence" requirement of § 244(a)(1) of Act so as to be eligible to seek suspension of deportation. INS v. Phinpathya, p. 183.

IMPARTIALITY OF JURORS. See **Habeas Corpus, 1.**

INCOME TAXES. See **Airport Development Acceleration Act of 1973; Internal Revenue Code.**

INFRINGEMENT OF COPYRIGHTS. See **Copyrights.**

INSPECTION OF PREMISES UNDER CLEAN AIR ACT. See **Collateral Estoppel, 1.**

INSTRUCTIONS TO JURY. See **Procedure.**

INSURANCE PROCEEDS FROM ARSON. See **Criminal Law.**

INTERNAL REVENUE CODE.

1. *Fraudulent return—Nonfraudulent amended return—Limitations period for tax assessment.*—Where a taxpayer files a false or fraudulent return § 6501(c)(1) of Code applies and a tax may be assessed "at any time," regardless of whether 3-year limitations period for assessment of income taxes expired after taxpayer filed a nonfraudulent amended return. Badaracco v. Commissioner, p. 386.

2. *Oil and gas depletion allowance—Independent producers and royalty owners.*—Section 613A of Code, relating to deduction from taxable income of percentage depletion allowance by independent oil and gas producers and royalty owners, does not deny allowance for percentage depletion on advance royalty or lease bonus income altogether; such taxpayers are entitled to allowance at some time during productive life of oil and gas leases. Commissioner v. Engle, p. 206.

INVESTMENT COMPANY ACT OF 1940.

Shareholder's suit—Fees of company's adviser.—Federal Rule of Civil Procedure 23.1, which applies to stockholders' "derivative" actions, does not apply to an action brought by an investment company shareholder against company and its adviser for breach of fiduciary duty as to adviser's fees under § 36(b) of Act, and thus plaintiff in such a case need not first make a demand upon company's directors before bringing suit. Daily Income Fund, Inc. v. Fox, p. 523.

JURISDICTION.

Court of Appeals—University's assistance of all-male society—Mootness.—Where (1) Secretary of Health, Education, and Welfare notified a university that it was violating a federal regulation by allowing peti-

JURISDICTION—Continued.

tioner all-male honorary society to conduct initiation ceremony on campus, (2) university thereafter prohibited ceremony, (3) petitioner then brought an action in Federal District Court challenging Secretary's interpretation of regulation, and (4) before Court of Appeals affirmed summary judgment for Secretary, university's president wrote a letter to petitioner stating that regardless of lawsuit's outcome, petitioner could not conduct activities on campus until it discontinued its sexually discriminatory membership policy, letter rendered case moot and Court of Appeals had no jurisdiction to decide it. Iron Arrow Honor Society v. Heckler, p. 67.

JURORS. See also **Constitutional Law, I; Habeas Corpus, 1.**

Voir dire examination—Peremptory challenges.—In action by respondent parents and son to recover for injuries sustained by son while operating a lawnmower manufactured by petitioner where jury returned a verdict for petitioner, Court of Appeals erred in holding that new trial should have been granted because respondents' right of peremptory challenge of jurors was prejudiced when one of jurors did not respond to a question on *voir dire* seeking information concerning injuries of family members although juror's son had sustained a broken leg as a result of an exploding tire; respondents were not entitled to a new trial unless juror's failure to disclose denied them their right to an impartial jury. McDonough Power Equipment, Inc. v. Greenwood, p. 548.

JURY INSTRUCTIONS. See **Procedure.**

JURY SELECTION. See **Constitutional Law, I; Jurors.**

LEASES OF OIL AND GAS LANDS. See **Coastal Zone Management Act; Internal Revenue Code, 2; Stays, 7.**

LIMITATION OF ACTIONS. See **Internal Revenue Code, 1.**

MOOTNESS. See **Jurisdiction.**

NATURALIZATION OF ALIENS. See **Collateral Estoppel, 2.**

NEWS MEDIA'S RIGHT TO ATTEND VOIR DIRE EXAMINATION OF JURORS. See **Constitutional Law, I.**

NUCLEAR CONTAMINATION. See **Atomic Energy Act of 1954.**

OIL DEPLETION ALLOWANCE. See **Internal Revenue Code, 2.**

OIL LEASES. See **Coastal Zone Management Act; Internal Revenue Code, 2; Stays, 7.**

OKLAHOMA. See **Atomic Energy Act of 1954.**

ORGANIZED CRIME CONTROL ACT OF 1970. See **Criminal Law.**

OUTER CONTINENTAL SHELF LANDS ACT OF 1953. See **Coastal Zone Management Act.**

OUTER CONTINENTAL SHELF OIL AND GAS LEASES. See **Coastal Zone Management Act; Stays,** 7.

PER DIEM ALLOWANCE TO GOVERNMENT EMPLOYEES. See **Civil Service Reform Act of 1978.**

PEREMPTORY CHALLENGES OF JURORS. See **Jurors.**

PRE-EMPTION OF STATE LAW BY FEDERAL LAW. See **Airport Development Acceleration Act of 1973; Atomic Energy Act of 1954.**

PRESS' AND PUBLIC'S ACCESS TO VOIR DIRE EXAMINATION OF JURORS. See **Constitutional Law,** I.

PRICE-ANDERSON ACT. See **Atomic Energy Act of 1954.**

PROCEDURE.

Vacation of Court of Appeals' judgment—Remand.—Court of Appeals' judgment was vacated, and case was remanded, since Government's concession that District Court erroneously refused to give petitioner's character evidence instruction to jury in criminal case, as well as Government's contention that such error was harmless, should have been presented to Court of Appeals in first instance. Torres-Valencia v. United States, p. 44.

PRODUCTS LIABILITY. See **Jurors.**

PROPORTIONALITY OF DEATH SENTENCE. See **Stays,** 4, 5.

PUBLIC EMPLOYEES. See **Civil Service Reform Act of 1978.**

PUNITIVE DAMAGES. See **Atomic Energy Act of 1954.**

RACKETEERING. See **Criminal Law.**

RADIATION INJURIES. See **Atomic Energy Act of 1954.**

RECORDING TELEVISION PROGRAMS. See **Copyrights.**

RELOCATION OF TELEPHONE COMPANY'S FACILITIES. See **Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.**

RIGHT OF ACCESS TO CRIMINAL TRIALS. See **Constitutional Law,** I.

RIGHT TO FAIR TRIAL. See **Constitutional Law,** I; **Jurors.**

SEARCHES AND SEIZURES. See **Constitutional Law,** II.

SEX DISCRIMINATION. See **Jurisdiction.**

SHAREHOLDERS' SUITS. See **Investment Company Act of 1940.**

STATE INCOME TAXES. See **Airport Development Acceleration Act of 1973.**

STATUTES OF LIMITATIONS. See **Internal Revenue Code, 1.**

STAYS.

1. *Death sentence.*—Applications to stay executions are granted, where each execution was set for a date within period for petitioning this Court for certiorari to review Missouri Supreme Court's affirmance of each conviction and sentence. McDonald v. Missouri (BLACKMUN, J., in chambers), p. 1306.

2. *Death sentence.*—Application to stay execution is denied, where all of applicant's constitutional claims were previously considered in earlier proceedings in state and federal courts. Sullivan v. Wainwright, p. 109.

3. *Death sentence.*—Application to stay execution is denied, where fewer than four Justices would grant certiorari to review Federal Court of Appeals' affirmance of District Court's denial of habeas corpus relief to applicant state prisoner; this Court will not adopt a rule calling for an automatic stay where applicant is seeking review of denial of his first federal habeas corpus petition. Autry v. Estelle, p. 1.

4. *Death sentence.*—Application to stay execution is granted pending Court of Appeals' disposition of appeal from District Court's denial of habeas corpus relief—sought for first time on ground of Texas Court of Criminal Appeals' failure to consider proportionality of death sentence—or until a further order by this Court or by Circuit Justice. Autry v. Estelle (WHITE, J., in chambers), p. 1301.

5. *Death sentence—Vacation of stay.*—Application to vacate Court of Appeals' stay of respondent's execution, pending either this Court's anticipated review of law concerning state-court procedures for review of proportionality of death sentences or this Court's further directions, is granted. Maggio v. Williams, p. 46.

6. *Death sentence—Vacation of stay.*—Application to vacate Federal Circuit Judge's order staying respondent's execution is granted. Woodard v. Hutchins, p. 377.

7. *Sale of Outer Continental Shelf tracts.*—Applications to stay District Court's preliminary injunction prohibiting Secretary of Interior from conducting a sale of certain tracts on Pacific Outer Continental Shelf for oil and gas leasing are granted. Clark v. California (REHNQUIST, J., in chambers), p. 1304.

SUBPOENAS DUCES TECUM ISSUED BY LABOR DEPARTMENT. See **Constitutional Law**, II, 2.

SUPREME COURT.

1. Assignment of Justice Stewart (retired) to the United States Court of Appeals for the First Circuit, p. 1027.

2. Assignment of Justice Stewart (retired) to the United States Court of Appeals for the Third Circuit, p. 1074.

SUSPENSION OF DEPORTATION. See **Immigration and Nationality Act.**

TAPE-RECORDING TELEVISION PROGRAMS. See **Copyrights.**

TAXES. See **Airport Development Acceleration Act of 1973; Internal Revenue Code.**

TAX REDUCTION ACT OF 1975. See **Internal Revenue Code, 2.**

TELEPHONE COMPANIES. See **Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.**

TELEVISION. See **Copyrights.**

TRAVEL EXPENSES OF GOVERNMENT EMPLOYEES. See **Civil Service Reform Act of 1978.**

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970.

"Displaced person"—Telephone company.—Where respondent company was required to relocate telephone transmission facilities because of a street realignment resulting from federally funded urban renewal project carried out by petitioner, a political subdivision of State, respondent was not a "displaced person" entitled to relocation benefits under Act. Norfolk Redevelopment & Housing Authority v. Chesapeake & Potomac Telephone Co., p. 30.

UNION REPRESENTATIVES. See **Civil Service Reform Act of 1978.**

UNIVERSITY'S ASSISTANCE OF ALL-MALE HONORARY SOCIETY. See **Jurisdiction.**

URBAN RENEWAL PROJECTS. See **Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.**

VACATION OF STAYS. See **Stays, 5, 6.**

VICARIOUS LIABILITY FOR COPYRIGHT INFRINGEMENT. See **Copyrights.**

VIDEO TAPE RECORDERS. See **Copyrights.**

VOIR DIRE EXAMINATION OF JURORS. See **Constitutional Law, I; Jurors.**

WORDS AND PHRASES.

1. *"Directly affecting the coastal zone."* § 307(c)(1), Coastal Zone Management Act, 16 U. S. C. § 1456(c)(1) (1982 ed.). Secretary of Interior v. California, p. 312.

2. *"Displaced person."* § 101(6), Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U. S. C. § 4601(6). Norfolk Redevelopment & Housing Authority v. Chesapeake & Potomac Telephone Co., p. 30.

3. *"Interest."* 18 U. S. C. § 1963(a)(1). Russello v. United States, p. 16.

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